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APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

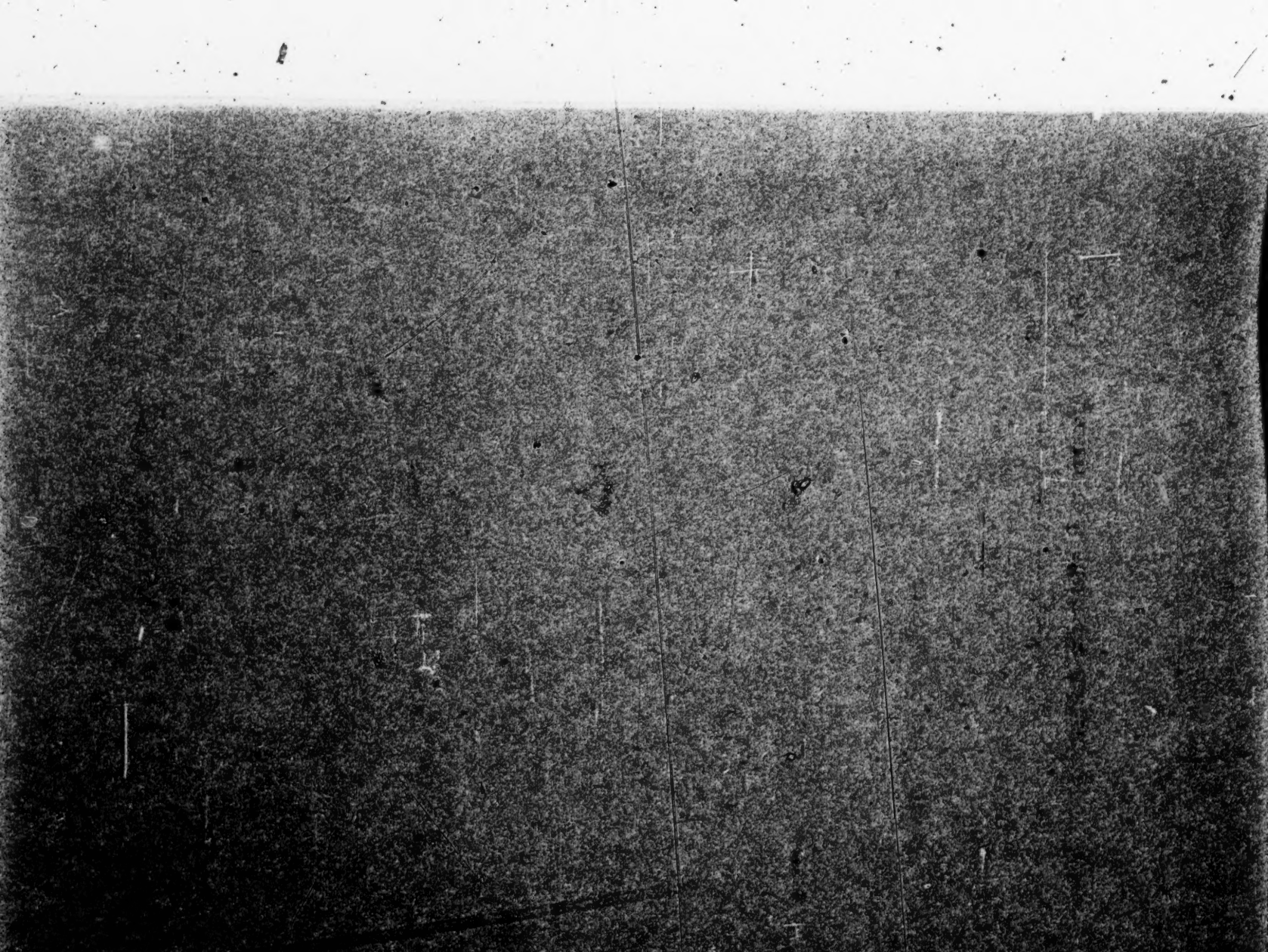
JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1968

CERTIORARI GRANTED OCTOBER 14, 1968



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Docket Entries

PROCEEDINGS IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DATE	PROCEEDINGS
3–31–67	Filed complaint and issued summons.
4– 5–67	Filed ANSWER of Brotherhood of Railroad Trainmen, and W. J. Weil.
4–20–67	Filed deft's (Erie Lackawanna RR Co.) ANSWER.
4–26–67	Filed pltff's REPLY to counterclaim.
4–27–67	Filed OPINION #33453. Herlands, J. • • • The defendants, singularly and collectively, and their officers, servants and representatives are hereby restrained—pending a final determination of this action—from discharge, or threatening to discharge, or attempting to cause the discharge of the plaintiffs or any other employee of the defendant railroad for failure to join or maintain membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America. This opinion constitutes the findings of fact and conclusions of law. So ordered. (mailed notices)
5–10–67	Filed verified complaint for injunction, declaratory judgment & damages.
5–17–67	Filed defts' (Brotherhood of RR Trainmen & Weil) ANSWER to Intervenor-Pltffs. complaint.
5–18–67	Filed deft's (Erie-Lackawanna) ANSWER.

Docket Entries

DATE	PROCEEDINGS
5-24-67	Filed Requests for Admission under Rule 36.
6- 8-67	Filed Notice of Motion re: Strike Complaint. Ret. 6/15/67.
6- 8-67	Filed Requests for Admission.
6- 8-67	Filed Notice of Motion re: Summary Judgment. Ret. 6/20/67.
6-23-67	Filed defts' (Brotherhood) affdvt. & notice of motion for summary judgment. ret. 7-5-67.
6-27-67	Filed defts' (Erie-Lackawanna) affdvt. & notice of motion for summary judgment. ret. 7-5-67.
6-27-67	Filed defts' (Erie-Lackawanna) affidvt. in opposition to motion filed 6-8-67.
6-27-67	Filed defts' (BRT & Weil) affdvt. in opposition to motion filed 6-8-67.
6-27-67	Filed defts' (BRT & Weil) affidvt. in opposition to motion filed 6-8-67, etc.
7-25-67	Filed memo endorsed—motion of deft BRT & Weil is denied—see opinion filed this date—Palmieri, J. m/n.
7-25-67	Filed memo endorsed—deft Erie's motion for summary judgment is denied—See opinion filed this date—Palmieri, J. m/n.
7-25-67	Filed memo endorsed—pltff's motion for summary judgment is granted—See opinion filed this date—Palmieri, J. m/n.

Docket Entries

7-25-67	Filed memorandum Opinion #33869—since the issue of invalidity of the contract clause complained of must be decided in favor of the pltffs the counterclaim for damages must of necessity be dismissed—motion of pltffs & intervenor-pltffs for summary judgment is granted—motion of defts for summary judgment is denied—Submit order on notice consonant herewith—Palmieri, J.

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 244—September Term, 1967.

(Argued January 3, 1968 Decided March 5, 1968.)

Docket No. 31809

JOHN P. O'CONNELL, R. A. GALLO and CHARLES DOYLE, etc., *et al.*,

Plaintiffs-Appellees,

WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON and JOHN A. BISH, etc., *et al.*,

Intervenors-Plaintiffs-Appellees,

—v.—

ERIE LACKAWANNA RAILROAD COMPANY, a corporation,

Defendant,

—and—

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, *et al.*,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *J.*,

granting plaintiff's motion for summary judgment in an action for damages, injunctive relief and a declaratory judgment that two union shop agreements between the Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company which did not provide that membership in any union national in scope and organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in an operating service satisfies the union shop agreement violated Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152, Eleventh.

Affirmed.

LEE LEIBIK, 343 South Dearborn Street, Chicago, Illinois (Ruth Weyand, 343 South Dearborn Street, Chicago, Illinois, on the brief), *for plaintiffs-appellees and intervenors-plaintiffs-appellees.*

ARNOLD B. ELKIND, 122 East 42nd Street, New York, New York, *for defendants-appellants.*

LUMBARD, *Chief Judge*:

Defendants appeal from a judgment which found strict union shop clauses in a railroad collective bargaining agreement void and enjoined the appellants from requiring membership in the appellant union as a condition of continued employment. Appellees successfully argued on motion for preliminary injunction before Judge Herlands, 268 F. Supp. 397 (SDNY 1967), and on motion for summary judgment and a permanent injunction before Judge Palmieri, that the union shop clause appellant negotiated with the railroad violates the clear language of Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152,

Eleventh, and that the union and railroad could not lawfully condition employment upon membership in appellant union even though the union is the sole bargaining agent for all of the railroad's employees. Jurisdiction is based upon 28 U. S. C. §1337 and the Declaratory Judgment Act, 28 U. S. C. §2201.

Appellant concedes that if the words of Section 2, Eleventh of the Railway Labor Act are given their natural meaning, the agreement is invalid.[1] However, it asks the

---

1 Section 2

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organization duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * PROVIDED, HOWEVER, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. PROVIDED, FURTHER, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

court to avoid "the melancholy irrationalism of interpreting subsection (c) literally." We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant contends. We affirm.

The suit was brought by the Switchmen's Union of North America, AFL-CIO, and three yard service employees of the Erie Lackawanna Railroad Company on behalf of the more than 500 members of the Switchmen's Union employed by the Erie Lackawanna against defendant-appellant Brotherhood of Railway Trainmen and Erie Lackawanna.

Prior to the merger of the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad in 1960, plaintiff Switchmen's Union had been the recognized bargaining representative of the yard foremen, helpers and switchtenders employed by the Lackawanna Railroad. Appellant Brotherhood represented these same crafts and classes on the Erie Railroad.

Following enactment of the Union Shop Amendment to the Railway Labor Act in January 1951, both unions entered union shop contracts with the railroads with which they had collective bargaining agreements. They incorporated into the contracts the language of Section 2, Eleventh of the Railway Labor Act as amended, 45 U. S. C. 152, Eleventh (1964), and construed the union shop provisions so that membership in either Switchmen's Union or Order of Railway Conductors satisfied the membership requirements of the Brotherhood's contract and membership in the Brotherhood satisfied the membership and requirement of the Switchmen's contract.

When the two railroads merged in 1960, the National Mediation Board conducted an election among all the yard

service employees of the merged railroads. The Brotherhood won from the Switchmen's Union by 43 votes out of a total of 1943 votes cast. In a representation election in November 1967 the Brotherhood received 941 votes to the Switchmen's Union's 695. From 1960 until March 1967, appellant Union and defendant railroad construed and applied the union shop provisions of the contract so that membership in either the Switchmen's Union or Order of Railway Conductors satisfied the membership requirement.

On March 14, 1967 the Erie Lackawanna and appellant entered a collective bargaining agreement which provided:

> "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards . . . represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen."

On April 4, 1967 the same parties entered a similar contract with respect to employees on the Erie District requir-

ing them to become and remain members of appellant union as a condition of continued employment.

In granting a preliminary injunction against enforcement of this union shop provision, Judge Herlands found that the union shop agreements entered in 1967 violated the Railway Labor Act because they failed to permit employees to satisfy the membership requirements of the contract through membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board. 268 F. Supp. 397 (S D N Y 1967). After the preliminary injunction was granted, the Order of Railway Conductors and Brakemen and four of its members suing on behalf of the more than 225 members of the Order employed by the Erie Lackawanna were granted leave to intervene. On July 25, 1967, Judge Palmieri granted plaintiffs' motion for summary judgment and subsequently issued a permanent injunction. He denied defendants' cross-motion for summary judgment and entered judgment for plaintiff on appellant's counterclaim.

We believe that the legislative history of the section shows that it was meant to permit membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board to satisfy the union shop requirement of a contract pursuant to section 2, Eleventh of the Railway Labor Act.

The Seventh Circuit recently has reached the same conclusion, *Berkholz* v. *Dirks*, —— F. 2d —— (7th Cir. Feb. 12, 1968).

In 1934 the railway unions agreed to amendments to the Railway Labor Act which prohibited all union shop agreements in order to reduce the strength of company unions.

S. Rep. No. 2262, 81st Cong., 2d Sess., pp. 2-3, (1950); Hearings on H. R. 7789 before Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., pp. 3-4, 7-8, 16-17 (1950). See *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 489 (1957). By 1950, with the virtual elimination of company unions, the situation had changed so that twenty-one railway labor organizations, acting through the Railway Labor Executives Association, sponsored a bill to permit railway unions to enter union shop agreements similar to those authorized under the National Labor Relations Act, 29 U. S. C. §§157, 158.

The bill which was originally introduced, S. 3295, 81st Cong., 2d Sess., H. R. 7789, 81st Cong., 2d Sess. (1950), contained only one limitation: that the contracting labor organization must not deny any employee membership or expel him because of membership in any other labor organization. George M. Harrison, spokesman for the Association, testified that the reason for the provision was to permit an employee to retain membership in the union representing the craft or class in which he was mainly employed after temporary promotion or demotion to a different craft or class. He said:

> "Unlike most collective-bargaining representatives in outside industry, there are those in the railroad industry which recognize and protect the rights of employees who, because of the nature of their work, move back and forth across craft or class lines, and consequently move from the rules and working conditions of one collective-bargaining agreement to another. Good examples are those employees in the firemen's craft or class and those in the engineers' craft or class. The ordinary line of promotion for a fireman is to the position of engineer, and in a reduction of forces the

engineer returns to a fireman's position. These two crafts or classes usually are represented by different organizations. Conceivably, either the firemen's or engineers' organizations, or any other organization concerned with the movement of employees back and forth from one craft or class to another, could deny membership to employees who are members of another labor organization, and under a union-shop agreement endeavor to compel a carrier to discharge an employee whom the union would not accept because of his membership in another union.

"[I]t was deemed advisable to make this restriction absolutely clear so that employment could not be denied because a union refused to accept an employee into membership because he belonged to another union. That is the purpose of the phrase on lines 14 and 15 of page 2."

Hearings on S. 3295 Before a Subcomm. of the Comm. on Labor and Public Welfare, 81st Cong., 2d Sess., 18-19. See also Hearings on H. R. 7789 before the Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 13.

However, this wording still created a problem for the railroad operating unions and they opposed the bill because it would have permitted a union to demand that employees working in the craft or class which the union represented belong to the union which was their bargaining representative as well as to the union to which they already belonged. As Mr. Justice Harlan said in *Penn. RR* v. *Rychlik*, 352 U. S. 480, 490 (1957):

"[T]he hearings on the bill revealed a problem, peculiar to the railroad industry, in establishing the union shop. Labor in this industry is organized largely on craft

rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen, and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time, or a conductor might have to serve temporarily as brakeman. Under the ordinary union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of the crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits."

Defendant Trainmen's Union proposed an amendment to the bill to provide for inter-craft mobility without dual-unionism:

"provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is

the duly designated or recognized craft or class representative of any one of them."

Hearings on S. 3295 at 68-69; Hearings on H. R. 7789 at 32-33. Rejection of appellant's proposal and later adoption of the different language contained in Section 2 Eleventh (c) is a strong indication that Congress did not intend the result which appellant urges upon us.

While the bill was reported to both the Senate and the House without any provision for inter-craft mobility, S. Rep. No. 2262, 81st Cong., 2d Sess. (1951), H. R. Rep. No. 2811, 81st Cong., 2d Sess. (1951), members of the committees which had considered the bills met with representatives of the Railway Labor Executives' Association and the American Federation of Labor and agreed that when the bills were presented on the floor the committees would also offer an amendment stating,

"*Provided further*, that no such agreement shall require membership in more than one labor organization;" 96 Cong. Rec. 15735 (Senate 1950); 96 Cong. Rec. 17052 (House 1951).

In presenting this amendment to the Senate, Senator Hill stated,

> "An employee could belong to as many different unions as he wished to belong to. But he cannot be required to belong to one. If he belongs to one, he meets the provisions of the statute, and he cannot be required to pay dues to or to belong to more than one union."

96 Cong. Rec. 15738. Four of the operating unions, including the Brotherhood of Railway Trainmen and the Order of Railway Conductors, opposed the bill as amended. The Switchmen's Union supported the bill as amended. Consideration of the bill was postponed while the unions opposing

the bill were given an opportunity to agree upon an amendment. 96 Cong. Rec. 16189 (1950). Three of the four unions agreed to support the bill if amended to include the language now contained in Section 2, Eleventh (c). 96 Cong. Rec. 16261, 16330 (1950). Only the Brotherhood of Locomotive Engineers opposed adoption of the bill. Their opposition was based upon a belief that the bill would "guarantee that the young man who has served his apprenticeship as a locomotive fireman shall never be required to become a member of the Brotherhood of Locomotive Engineers." 96 Cong. Rec. 17052 (1951).

On December 7, 1950 Senators Taft and Hill offered the amendment drafted by the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brotherhood of Railroad Trainmen and it was adopted by the Senate the same day. 96 Cong. Rec. 16268 (1950). Senator Holland noted that the debate over the amendment had given notice to the Senate that the amendment made membership in any union among the operating brotherhoods sufficient. 96 Cong. Rec. 16322 (1950). The Senate passed S. 3295 as amended on December 11, 96 Cong. Rec. 16378 (1950). On January 1, 1951 the House agreed to consider S. 3295 in place of H. R. 7789, a similar bill. The debate in the House makes it clear that the Representatives understood the bill to make membership in any of the unions sufficient. Representative Scott, a member of the Interstate and Foreign Commerce Committee, said, "[The bill] provides that in transportation groups such as engineers, firemen, and so forth, membership in any organization, national in scope, which accepts such employees as members shall fulfill requirements of union membership." Representative Harris, who served as spokesman for the House Committee, explained the history of the Senate amendment

and stated that it "leaves to the individual employee in the operating service the choice of operating union to which he will belong, and this specifically resolves any doubt concerning a possible requirement of dual membership." 96 Cong. Rec. 17059 (1951). And Congressman O'Hara endorsed the statement of the Brotherhood of Locomotive Engineers that the amendment would mean that an Engineer would never have to join the Engineer's Union. 96 Cong. Rec. 17052 (1951).

Nevertheless appellant argues that the Supreme Court has limited the application of the proviso to situations where both unions are bargaining agents for crafts or classes of employees on the same railroad. We do not consider the language in *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U. S. 480 (1957) which appellant relies upon to be dispositive. The Court held that "Section 2, Eleventh (c) allows alternative union membership only in those unions which have already qualified under Section 3, First, of the Act, as electors of the union representatives on the National Railroad Adjustment Board, and not membership in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Railway Labor Act." 352 U. S. at 485. The issue of the scope of Eleventh (c) as applied to unions qualified under Section 3, First, of the Act was not before the Court. It only decided that membership in a union which was not so qualified did not satisfy the union shop provisions of the Act.

However, appellant points to other language at page 489 of the opinion:

> "[T]he sole aim of the provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members

> employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative,"

and to a statement at pages 492 and 493 that,

> "The only purpose of Section 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism when an employee temporarily changes crafts. The aim of the Section, which was drafted by the established unions themselves, quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility."

While the Court described the section as having only one purpose, prevention of compulsory dual unionism and provision for intercraft mobility, there are two aspects to the operation of the proviso reflecting the two situations in which intercraft mobility might lead to the dual unionism problem.

First, when an employee changes crafts his new craft may be represented by a different union. Under the statute the employee clearly does not have to change unions. The second situation in which the problem arises, which was not discussed in *Rychlik*, is when so many employees change crafts without changing unions that the bargaining agent for the craft no longer has majority membership in the craft. For example, when there are many layoffs so many engineers may be performing firemen's jobs that there are more engineers than firemen in firemen's posi-

tions. The result might be that the Brotherhood of Locomotive Engineers will get the contracts for both firemen and engineers and the Brotherhood of Locomotive Firemen and Enginemen will no longer have a contract with the railroad. In this situation the firemen may still want to be members of the Locomotive Firemen's Brotherhood which is their traditional craft union. The second aspect of the operations of Eleventh (c) is to permit these firemen, now a minority, to satisfy the union shop requirement by membership in their craft union, even though it is no longer their bargaining agent.

The annual reports of the National Mediation Board to Congress from 1934 to 1950 show that during this period there were 544 instances on 64 different railroads in which, through demotions or promotions due to changed employment conditions or through union recruiting, a minority union in a craft achieved a majority and as a result took over the contract traditionally held by another union. It was with this history in mind that the operating unions drafted the amendment to the bill which became §2, Eleventh (c). Obviously the amendment which the unions drafted was intended to make it clear that an employee would be able to satisfy union shop requirements by retaining membership in an operating union whether or not it was the collective bargaining agent for the craft or class in which he was working and whether or not it was the bargaining agent for any craft or class.

In any event, the Supreme Court noted in its opinion in the *Rychlik* case, that in deciding the case it did not reach the questions which had been decided by this Court. 352 U. S. at 485. Our opinion, remanding to the district court for a finding on whether the union which Rychlik joined was "national in scope" within the meaning of the Act, was predicated upon holding that membership in any such union

would satisfy the requirement of §152 Eleventh (c). 229 F. 2d at 171, 174 (2d Cir. 1956). We see no reason to hold otherwise. No argument has been advanced which compels overruling of our decision in *Rychlik*, as limited by the Supreme Court's holding to unions qualified under Section 3, First of the Act.

We are not persuaded by the contrary holding of the Third Circuit in *Rohrer* v. *Conemaugh & Black Lick Railroad Company*, 359 F. 2d 127 (1966), which the Seventh Circuit also has declined to follow, *Berkholz* v. *Dirks* —— F. 2d —— (7th Cir., Feb. 12, 1968).

Further, the Supreme Court's decision in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326 (1959) implies that an employee can satisfy the union shop requirement by membership in any of the recognized railroad unions for the First Division, since the Court assumed that Felter had validly changed his union membership although it was clear that he left the union which was his collective bargaining agent and it was not clear that his new union represented any of the railroad's employees.

It is true, as appellant contends, that as in the National Labor Relations Act, the purpose of the union shop is to prevent employees from being "free riders," see *International Association of Machinists* v. *Street*, 367 U. S. 739, 760-64 (1951). But we cannot say that the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose. It is quite conceivable that Congress intended to implement its scheme through a system of reciprocal gains and losses among the various operating unions. While the Brotherhood of Railroad Trainmen does not collect dues from some of the employees of the Erie Lackawanna whom it represents, concededly it collects

dues from employees of other railroads who are represented by other operating unions. See 367 U. S. at 764 n. 15.

We are unable to find any justification for appellant's contention that it is entitled to a strict union shop despite the language of the Act because it is the sole collective bargaining agent for all employees on the railroad.

Appellant's cause of action for libel, pleaded in its answer as a counterclaim, was dismissed below because it "could become an issue only if the contract complained of were held to be valid as a matter of law." We disagree. The alleged libels described the union shop agreement as a "Slave Labor Agreement" and described membership in appellant as "Dictatorship with no voice in the affairs of their Union." No matter what the status of the union shop agreement, reference to a competing union as a "dictatorship" could constitute a libel. However, this cause of action does not arise out of the same transaction or occurrence as appellees' claim. As a permissible counterclaim it must be supported by independent jurisdictional grounds. 6 Moore, Federal Practice par. 13.19[1]. See *Lesnik* v. *Public Industrials Corporation*, 144 F. 2d 968, 975-976 (2d Cir. 1944). We find appellant's counterclaim lacking in this respect and affirm its dismissal for lack of jurisdiction over the subject matter.

The judgment is affirmed.

(R. 1261-1267)

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause came on to be heard by the Court on July 5, 1967, on cross-motions for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure and was argued by counsel, who submitted memoranda to the Court, and the Court upon consideration thereof, having filed an opinion on July 25, 1967, setting forth the Court's conclusions of law, it is ordered, adjudged, decreed and declared as follows:

1. The Memorandum of Agreement between the defendant Erie Lackawanna Railroad Company and the defendant Brotherhood of Railroad Trainmen dated March 14, 1967, effective March 14, 1967, providing a union shop applicable to the former D.L. & W. District, violates Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act, (45 U.S.C. 152, Third, Fourth, Fifth and Eleventh) and is null and void and of no effect.

2. The Memorandum of Agreement between the defendant Erie Lackawanna Railroad Company and the defendant Brotherhood of Railroad Trainmen dated April 4, 1967 effective April 15, 1967, providing a union shop applicable to the former Erie District, violates Section 2, Third, Fourth, Fifth and Eleventh, of the Railway Labor Act,

(45 U.S.C. 152, Third, Fourth, Fifth and Eleventh) and is null and void of no effect.

3. The defendant Erie Lackawanna Railroad Company, its officers, agents, servants and representatives are permanently enjoined and restrained from discharging or threatening to discharge the plaintiffs or the intervenor-plaintiffs or any of them or any other employee for failure to join or maintain membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America or in the intervenor-plaintiff Order of Railway Conductors and Brakemen.

4. The defendant Griff Davis, individually and as General Chairman of the defendant Brotherhood of Railroad Trainmen, and W. J. Weil, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, and the Brotherhood of Railroad Trainmen, its officers, agents, servants and representatives are permanently enjoined and restrained from causing or attempting to cause the discharge of the plaintiffs or the plaintiff intervenors or any of them or any other employee of the defendant Erie Lackawanna Railroad Company for failure to join or maintain membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America or in the intervenor-plaintiff Order of Railway Conductors and Brakemen.

5. The plaintiffs John P. O'Connell, R. A. Gallo, and Charles Doyle, individually and in behalf of all members of the Switchmen's Union, who are employed by the Erie

Lackawanna Railroad Company, and Switchmen's Union of North America, AFL-CIO and the intervenor-plaintiffs Wayne W. Delaney, Dorrence E. Neu, Glen L. Thompson, and John A. Bish, individually and in behalf of all members of the Order of Railway Conductors and Brakemen, who are employed by the Erie Lackawanna Railroad Company, and Order of Railway Conductors and Brakemen, do have and they are hereby granted judgment in their favor and against defendants and counterclaimants, Brotherhood of Railroad Trainmen and that counterclaimants take nothing by their counterclaim.

6. The plaintiffs are hereby awarded costs.

Dated: August 29, 1967.

EDMUND L. PALMIERI
United States District Judge

Judgment entered 8/29/67

JOHN J. O'LEAR, JR.
Clerk

(R. 1225-1234)

Opinion by Palmieri, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances

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Opinion by Palmieri, D.J.

PALMIERI, *J.*

These are cross-motions for summary judgment in an action seeking damages, injunctive relief and a declaratory judgment. The relevant facts are not in dispute.

The dispute is essentially one between railway unions and raises as its central issue the validity of a union shop agreement entered into on March 14, 1967, between the defendant railroad and the Brotherhood of Railroad Trainmen (Brotherhood). The agreement requires all employees covered by it to join and maintain membership in the Brotherhood of Railroad Trainmen.[1] It does not provide, in accordance with the requirements of Section 2, Eleventh (c) of the Railway Labor Act,[2] that alternate membership

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[1] "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N.J., Newark, N.J. and Dundee, N.J., Port Jervis, N.Y., Middletown, N.Y., Newburg, N.Y., Syracuse, N.Y., Utica, N.Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood...."

[2] The pertinent statutory provisions are in Section 2, Eleventh (a) and (c) and read as follows (45 U.S.C. 152, Eleventh):

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *

* * *

in any other union national in scope and admitting yard service employees to membership satisfies the union shop agreement.

All the unions involved are admittedly national in scope, organized in accordance with the Railway Labor Act and admit to membership crafts or classes of yard service employees within the meaning of Section 2, Eleventh (c) of the Railway Labor Act.

The plaintiffs and intervenor plaintiffs are the Switchmen's Union and the Order of Railway Conductors and their members.

Under date of April 27, 1967, in a well documented opinion, Judge Herlands of this Court granted a preliminary injunction enjoining the defendants from discharging, or threatening to discharge or attempting to cause the dis-

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"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employees, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. *Provided, further,* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

charge of the plaintiffs, or any other employees of the defendant railroad for failure to join or maintain membership in the defendant Brotherhood so long as he maintains membership in the plaintiff Switchmen's Union of North America. In granting threshold injunctive relief it was the Court's decision that the union shop agreement between the Brotherhood and the Erie violated the Railway Labor Act in that it failed to provide, in accordance with Section 2, Eleventh (c) of that act (45 U.S.C. § 152, Eleventh (c)) (*supra*, footnote 2), that the requirement of union membership shall be satisfied if an employee maintains membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board. Judge Herlands traced the legislative history of the statutory provision and concluded that the statutory language and its legislative history left little interpretative flexibility and that "absent specific direction by Congress it would be most imprudent for the federal courts to reach out and create another approach to the problem of intercraft mobility and thereby assume the role of referee in inter-union power struggles. See, *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 496 (1957)."

Subsequent to the issuance of the preliminary injunction the intervenor-plaintiff Order of Railway Conductors and Brakemen, and its members, became parties and the preliminary injunction was extended to protect its employees from having to join or maintain membership in the defendant Brotherhood so long as they maintained membership in either the Switchmen's Union or the Order of Railway Conductors.

The positions of the plaintiffs and the intervenor-plaintiffs with respect to the motions for summary judgment are identical, both asserting the right to protect by appropriate provisions of the railroad's union shop agreement their right to the alternate union membership privilege granted by Section 2, Eleventh (c) of the Railway Labor Act.

This Court accepts and adopts as valid the conclusion that Section 2, Eleventh (c) of the Railway Labor Act was violated by the union shop agreement in question. The contract between the Erie and the Brotherhood fails on its face to recognize the right of the employee to alternate union membership. This is tantamount to a threat to the employee that he will lose his job unless he complies with the language as written. See, *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 779-780 (2d Cir. 1954); *Red Star Express Lines* v. *NLRB*, 196 F.2d 78, 81 (2d Cir. 1952); *NLRB* v. *Local No. 2 Plumbers*, 360 F.2d 428, 435 (2d Cir. 1966). The arguments of the Brotherhood to the contrary are unpersuasive. Prior to the contract in question, and ever since the 1951 enactment of the alternate membership provision, it appears to have been a uniform practice of the Brotherhood and of all operating unions to write the language of Section 2, Eleventh (c), into their contracts as an exception to the requirement of membership.[3] In any event the reserved intentions or asserted policies of the Brotherhood cannot change the impact of its invalid agreement. There is no basis for indulging in any presumption that the defendants intend to recognize the employees' right to alternate union membership as a means of satisfying the union

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[3] David Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. Law Journal, 441, 444 (July 1955):

"Terms corresponding to this clause are found, of course, in every lawful union shop agreement covering the operating crafts."

shop obligation. Nor would it be proper to permit the employees to be caught in a maze of legal subtleties by the equivocal stance the Brotherhood takes in this litigation. Indeed its insistence before this Court that employees have no right to alternate union membership as a means of satisfying the union shop obligation but must join the Brotherhood negates any intention to recognize the validity of Section 2, Eleventh (c), of the Railway Labor Act. The deliberate omission of any reference to this crucial statutory provision in the railroad's union shop agreement with the Brotherhood gave the employees no choice except to seek enforcement of their rights by legal means.

The plaintiffs concede that the resolution of their original claim for damages has become moot in view of the issuance of the temporary injunction. The defendants' counterclaim for damages could become an issue only if the contract complained of were held to be valid as a matter of law. Since the issue of the invalidity of the contract clause complained of must be decided in favor of the plaintiffs, the counterclaim for damages must of necessity be dismissed.

The motion of plaintiffs and intervenor-plaintiffs for summary judgment is granted. The motion of defendants for summary judgment is denied.

Submit order on notice consonant herewith.

Dated: New York, N. Y.
July 25, 1967

EDMUND L. PALMIERI
U.S.D.J.

(R. 131-154)

Opinion by Herlands, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

STURM & PERL, ESQS., (New York)
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—and—

LEE LEIBIK and RUTH WEYAND, ESQS., (Chicago)
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Attorney for Defendant Erie Lackawanna RR Co.

ARNOLD B. ELKIND, ESQ., (New York)
Attorney for Defendants Brotherhood of Railroad Trainmen and W. J. Weil, individually.

HERLANDS, *District Judge:*

The instant motion for a preliminary injunction, brought on by an order to show cause, raises important questions as to the proper interpretation of the 1951 amendments to the Railway Labor Act. Plaintiffs are three yard service employees of the defendant Erie Lackawanna Railroad Company (hereinafter referred to as the Erie), who sue

individually and on behalf of all members of the Switchmen's Union of North America, AFL-CIO, (hereinafter referred to as the Switchmen's Union) employed by the defendant railroad. The Switchmen's Union is also a party plaintiff. The defendants are the Erie, the Brotherhood of Railroad Trainmen (hereinafter referred to as the Brotherhood), and two officers of the Brotherhood who are sued in their individual and representative capacities.

According to the verified complaint, the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad merged in October, 1960, to form the defendant railroad. For many years prior to the merger the Switchmen's Union had been the duly designated and recognized representative of the craft or class of yard foremen, helpers and switch tenders (hereinafter referred to as yard service employees) of the Delaware, Lackawanna & Western R.R. Co., while the Brotherhood similarly represented the yard service employees of the Erie Railroad.

In March, 1964, the National Mediation Board conducted an election among all of the yard service employees of the merged railroad. The Brotherhood received 43 more votes than the Switchmen's Union, and was designated as their representative. Until March, 1967, the collective bargaining agreement between the Brotherhood and the Erie, like the pre-merger agreements of both the Switchmen's Union and the Brotherhood, contained a union shop clause which was expressly qualified by the language of Section 2, Eleventh (c) of the Railway Labor Act. Under this agreement, more than 500 yard service employees of the Erie maintained membership in the Switchmen's Union without joining the Brotherhood.

On March 14, 1967, the Brotherhood and the Erie entered into a new collective bargaining agreement, effective immediately, which provided that, as a condition of continued employment, all yard service employees in the New York Terminal Yards of the Erie "shall become and remain members" of the Brotherhood. No alternative membership clause was included in the union shop provision.

The essence of plaintiffs' claim is that this strict union shop agreement violates the Railway Labor Act in that it fails to provide—in accordance with Section 2, Eleventh (c) (45 U.S.C. § 152 Eleventh (c))—that the requirement of union membership shall be satisfied if an employee maintains membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board.

The complaint further alleges that the Brotherhood and the Erie "have threatened and are threatening" to discharge the individual plaintiffs and all other members of the Switchmen's Union employed by the Erie, unless they end their membership in the Switchmen's Union and become and remain members of the Brotherhood.

Each of the plaintiffs and the members of the class they represent have seniority rights and other employment benefits which would be lost in the event of a discharge for failure to join the Brotherhood as required by the new agreement. On the other hand, valuable insurance rights would be lost if they failed to continue membership in the Switchmen's Union. Yet, the constitution of the Brotherhood bars dual membership in a union, such as the Switch-

men's Union, which is seeking representation rights on behalf of the same class of employees on the same railroad. Even if they are not discharged for maintaining membership in the Switchmen's Union, they could not afford to pay fees and dues to two unions.

On the basis of these factual allegations, plaintiffs contend that their rights—protected under Section 2 of the Railway Labor Act—are being infringed, and that the defendants have caused and are threatening to cause irreparable injury to the plaintiff employees for which no remedy in money damages is available. They pray for a preliminary and permanent injunction restraining the defendants from "discharging or threatening to discharge, or attempting to cause the discharge" of any employee who fails to join the Brotherhood, so long as he maintains membership in the Switchmen's Union. They also seek a judgment declaring the union shop agreement null and void. Finally, plaintiff Switchmen's Union asks for money damages in the sum of 100,000. dollars.

The Brotherhood's verified answer admits that Exhibit A annexed to the complaint is a true copy of the collective bargaining agreement entered into between the Brotherhood and the Erie, but denies its illegality and denies substantially all of the other allegations of the complaint. Of immediate significance on this motion is defendant Brotherhood's denial that this Court has jurisdiction to construe the collective bargaining agreement, because Congress has vested exclusion jurisdiction over such disputes in the National Railroad Adjustment Board, and to system, group or regional Boards of Adjustment. The Brotherhood further denies that this Court has jurisdiction to determine the legality of the agreement under the Railway

Labor Act until the plaintiff employees have exhausted the procedures of the contract. The Brotherhood's verified answer also contains a counterclaim for libel.

The question of jurisdiction may be disposed of summarily. Plaintiffs invoke the power of this Court under 28 U.S.C. § 1337 conferring original jurisdiction upon this court of civil actions arising under any Act of Congress regulating Commerce, and under 28 U.S.C. § 2201, creating the remedy of declaratory judgments.

While the National Railroad Adjustment Board has exclusive and primary jurisdiction over disputes concerning the meaning of collective bargaining agreements in the railroad industry (*Slocum* v. *Delaware, Lackawanna & Western R.R. Co.*), 339 U.S. 239 (1950), and the instant agreement expressly provides its own procedure in cases of non-compliance with its provisions, it is well settled that the federal district courts have jurisdiction to grant injunctive and declaratory relief when the legality of such an agreement under the Railway Labor Act is called in question. See, e.g., *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Locomotive Firemen & Engineers,* 338 U.S. 232, 239 (1949); *Tunstall* v. *Brotherhood of Locomotive Firemen & Engineers,* 323 U.S. 210, 212-213 (1944); *Switchmen's Union of North America* v. *Southern Pacific Co.,* 253 F.2d 81 (9th Cir.), cert. denied, 358 U.S. 818 (1958).

The present action is governed by the principles expounded by the above decisions. There is here no question as to the proper construction of a collective bargaining agreement or its proper application to specific employees; rather, the issue posed is a straightforward question of statutory interpretation.

Opinion by Herlands, D.J.

The Brotherhood frankly conceded upon oral argument —as it was obviously compelled to do—that the union shop clause[1] of the new collective agreement would violate Section 2, Eleventh (c) of the Railway Labor Act if the latter were construed literally. The Brotherhood contends, however, that the legislative history of the provision in question, and the decisions construing it, unmistakably demonstrate the legality of the disputed agreement in the circumstances here prevailing.

Resolution of the issue posed necessarily depends upon an understanding of the purpose underlying Section 2, Eleventh (c) and the specific means chosen by Congress to effectuate that purpose.

Until 1951, union shop agreements were outlawed in the railroad industry. The prohibition had been added to the Railway Labor Act in 1934 at the behest of the unions themselves because such agreements had been used by the

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[1] The union shop clause of the collective bargaining agreement between the Brotherhood and the Erie reads as follows:

"1. It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N.J., Newark, N.J. and Dundee, N.J., Port Jervis, N.Y., Middletown, N.Y., Newburg, N.Y., Syracuse, N.Y., Utica, N.Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen."

railroads to perpetuate company unions. This problem having become dissipated with time, Congress amended the Act in 1951 to permit negotiation of union shop agreements. Section 2, Eleventh (a) (45 U.S.C. § 152 Eleventh (a)).

The provision enacted substantially parallels the law applicable to industry in general under the National Labor Relations Act. (29 U.S.C. §§ 157, 158). Its essential purpose is to permit unions—through agreements with employers—to compel the entire membership of the class of employees represented to bear an equitable portion of the cost of such representation. During the hearings leading to the 1951 amendments, however, the unions called attention to a problem—peculiar to the operating trades in the railroad industry—which would result from introduction of the union shop.

As described by the *Supreme Court in Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1952):

> "Labor in this industry is organized largely on craft rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time or a conductor might have to serve temporarily as

brakeman. Under the ordinary union shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits." (352 U.S. at 490)

The legislative representative of the defendant Brotherhood proposed an amendment to the bill at the House and Senate committee hearings, which was aimed at accommodating the needs of employees subject to the problem of intercraft mobility. The proposed amendment read as follows:

"provided that when two or more such crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them."

(Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, p. 69; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess. On H.R. 7789, pp. 32-33.)

On the other hand, the spokesman for the Railway Labor Executives Association—representing twenty one major railway unions including three of the five major unions in the operating trades[2]—urged that the problem of intercraft mobility be left to collective bargaining.

The bill permitting union shop agreements was reported to the Senate without amendment, but the Committee offered an amendment on the Senate floor which read:

> "*Provided further*, that no such (union shop) agreement shall require membership in more than one labor organization." 1950 Cong. Rec., p. 15735

When the Senate again considered the bill after a temporary adjournment, a substitute amendment—drafted at a conference of the railroad labor organizations—was offered[3] and approved. That amendment forms the present Section 2, Eleventh (c), the provision here in controversy. It reads as follows:

> "(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train,

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[2] The three unions are the Switchmen's Union, the Brotherhood of Firemen and Enginemen and the Order of Railway Conductors. The remaining two major unions are the defendant Brotherhood—which had submitted its own proposed amendment—and the Brotherhood of Locomotive Engineers—which had opposed any and all legislation permitting union shop agreements.

These five unions are the only ones represented by members of the First Division of the National Railroad Adjustment Board.

[3] Senator Hill, in explaining the substitute amendment after he had offered it on the floor of the Senate, stated that: "the only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union." 1950 Cong. Rec. p. 16268.

yard, or hostling service, that is an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

I. PLAINTIFFS' PROBABILITY OF SUCCESS

It is the Brotherhood's contention that the explicit language of Section 2, Eleventh (c) is inapplicable here, because "the 'narrow problem of intercraft mobility' does not exist with respect to the employees covered by this contract." The reason given is that "all involved crafts on the railroad are represented by the Brotherhood of Railroad Trainmen and there can be no problem of compulsory dual membership." (Defendant Brotherhood's Memorandum of Law, p. 9.) Correlatively, the Brotherhood argues that, since the Switchmen's Union does not presently serve as authorized bargaining representative for any of the Erie's employees, the plaintiffs here cannot invoke the protection of Section 2, Eleventh (c).

In effect, the Brotherhood is asking for a construction of the statute which conforms to the explicit language of the proposed amendment which the Brotherhood submitted to House and Senate committees during the 1950 hearings on the legislation. That construction would permit an employee—in lieu of joining the labor organization having the union shop agreement—to maintain membership in a labor organization "which is the duly designated or recognized . . . representative of any one of [the crafts or classes in which the employee has employment rights]." Hearings, *supra*. (Emphasis added.)

The recited legislative history demonstrates, however, that the Brotherhood's proposed amendment was not adopted by either of the legislative committees. Rather, the amendment offered and accepted on the floor of the Senate —which forms the present Section 2, Eleventh (c)—was

drafted collectively by the unions themselves.[4] The detailed language of the provision delineates the explicit means for dealing with the problem of intercraft mobility which was chosen by the unions and adopted by Congress.

In the face of this history, it would be a usurpation of the legislative function for this Court to assert that the language does not mean what it says, or that the problem of intercraft mobility ought to be handled by some other approach. While the plain meaning rule is not well regarded in this Circuit,[5] and has very recently been criticized by the Supreme Court in construing labor legislation,[6] the specificity of this particular provision and its legislative history leave little interpretative flexibility.

Most significantly, moreover, we have no reason to doubt that the explicit means delineated by Section 2, Eleventh (c) is the soundest approach to the problem of intercraft mobility.

The Brotherhood argues that Section 2, Eleventh (c) should not be construed to bar strict union shop provisions when the particular factual circumstances do not involve the problem of intercraft mobility. How—as a practical matter—would such a construction of the statute be implemented?

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[4] Until very recently, both the plaintiff Switchmen's Union and the defendant Brotherhood, among others, have expressly conditioned their union shop agreements by the literal terms of Section 2, Eleventh (c). *Cf. NLRB* v. *Drivers Local Union*, 362 U.S. 274, 290 (1960); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 549 (1940).

[5] See, *e.g.*, *Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464, 469-70 (2d Cir. 1966); *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963); *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

[6] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, —— (April 17, 1967) (Slip opinion pp. 5-6).

On each occasion that a strict union shop agreement is executed, the employees who are members of a minority union would be faced with the dilemma with which the instant plaintiffs are confronted. As here, the question of the validity of the agreement inevitably would find its way into the federal courts for an ad hoc adjudication.

But what evidence should be admitted, and what standards should the Court employ in determining the quality and magnitude of the problem of intercraft mobility in a particular situation? Is the Court to make a subjective evaluation of the relatedness of various crafts, the mobility of individual employees, the likelihood of a change in the bargaining representative resulting from shifts in the level of employment, etc.?

While the Brotherhood asserts that a possible standard could be whether the minority union is the designated or recognized representative of any related class or craft, the legislative history indicates that this approach was explicitly suggested to the Congressional committees by the Brotherhood but not adopted by them. It may well be that the railroad unions who drafted this provision collectively, and Congress in adopting their proposal, had chosen the specific approach delineated in Section 2, Eleventh (c)—recognizing that bargaining representatives may change with shifts in the level of employment as employees shuttle between crafts—so as not to upset the balance of union power which existed under the prevalent practice of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union.

In any event, whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees

in the operating crafts without promoting internal warfare between unions. Moreover, the provision—literally construed—reconciles the problem of intercraft mobility with the primary policy underlying the 1951 amendments to allow for an equitable sharing of the cost of representation. For, by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board,[7] membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements.[8]

Absent specific direction by Congress, it would be most imprudent for the federal courts to reach out to create another approach to the problem of intercraft mobility, and thereby assume the role of referee in interunion power struggles. *Cf., Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480, 496 (1957).

Rychlik and Rohrer

The Brotherhood purports to find conclusive support for its position here in two decisions construing the controversial provision of law. While broad language in both opinions lends some support to the Brotherhood's argument, neither case squarely raised the issue presently before this Court.

In *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1957), an operating employee of the railroad had been discharged

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[7] See n. 2, *supra*.

[8] See Plaintiffs' Memorandum of Law, pp. 18-19; Brief for Petitioner Brotherhood of Railroad Trainmen, p. 30; *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1957).

after resigning from the Brotherhood and contemporaneously joining the United Railroad Operating Crafts, a union which he "believed in good faith to be 'national in scope' and 'organized in accordance with' the Act," although it had never qualified as an elector to the First Division of the National Railroad Adjustment Board. The union shop provision of the Brotherhood's collective bargaining agreement was expressly conditioned by the precise language of Section 2, Eleventh (c).

Tracing much of the legislative history, the Court observed that the purpose of Congress was not "to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative, or to help dissident or rising new unions to recruit new members" (352 U.S. at 488-89); rather, the very narrow purpose was "to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." (352 U.S. at 492.)

Inquiring, then, into the "manner in which Congress achieved this purpose," the Court concluded that Section 2, Eleventh (c) did not permit alternative membership in merely "'any' labor organization which was national in scope and organized in accordance with the Act," but only in "such unions as have already qualified as electors to the First Division of the National Railroad Adjustment Board" under Section 3 of the Act. 352 U.S. at 495-96.

While the Brotherhood quotes various passages from the *Rychlik* opinion in support of its present contentions, it is clear that the explicit holding of the decision is not apposite. Moreover, one may—with equal facility—draw inferences from *Rychlik* which are contrary to the Brotherhood's position here.

The other decision relied upon by the Brotherhood is *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (3d Cir. 1966). There, the Brotherhood sat on the other side of the fence, inasmuch as the plaintiff—an employee of the defendant railroad—had been discharged after changing membership from the United Steelworkers of America to the Brotherhood. The Steelworkers union was the designated representative for all crafts and classes of employees on the defendant railroad, a subsidiary of the Bethlehem Steel Corporation—as it was on all other Bethlehem railroad subsidiaries. Its collective bargaining agreement with the defendant railroad contained a strict union shop clause.

Relying upon language in *Rychlik*, the Court of Appeals held that Section 2, Eleventh (c) was inapplicable to the factual situation presented because the plaintiff was "not faced with the dilemma of intercraft mobility." (359 F.2d at 130.) That factual situation, however, is clearly distinguishable from the one now before this Court. Although certification by the National Mediation Board on the Conemaugh & Black Lick R.R.—as on all railroads—is by craft or class, the Steelworkers union in fact represented "all the employees of the Railroad without regard to craft or class delineations." (359 F.2d at 130.) Indeed, the Steelworkers union has been certified as the representative of all employees since 1947, is not a railroad craft union but an industrial union, and has never qualified as an elector to the First Division—or any other division—of the National Railroad Adjustment Board.

Rohrer, therefore, presents a special situation which properly should be limited to its particular facts. To the extent that the decision is persuasive of the Brotherhood's

contentions in the instant litigation, the Court is of the opinion that it should not be followed.

II. Plaintiffs' Irreparable Injury

Plaintiffs having made the "clear showing of probable success"[9] cited by decisions of this Circuit as a prerequisite for the granting of a preliminary injunction, we turn to an examination of those other desiderata which a district court is compelled to evaluate in exercising its sound discretion.[10] In the particular circumstances of this case, primary emphasis must lie with the need to preserve the status quo pending a final determination on the merits.

Here, the individual plaintiffs—and the members of the class they represent—have been caught in the crossfire of an interunion dispute which has been brought to a head by the recently executed union shop agreement. Unless enforcement of the strict union shop clause is temporarily suspended, these employees shortly[11] will be required to choose a course of conduct which may have a crucial and irreversible effect upon their seniority rights, insurance coverage, and other employment benefits. It is neither fair

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[9] *Ames* v. *Associated Musicians*, 359 F.2d 777, 779 (2d Cir. 1966), quoting from *Societe Comptoir De L'Industrie* v. *Alexander's Dep't Store*, 299 F.2d 33, 35 (2d Cir. 1962). The Court of Appeals has stated recently that the "burden is less where the balance of hardships tips decidedly toward the party requesting the temporary relief." *Dino de Laurentiis Cinemalografica, S.p.A.* v. *D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966). *Accord, Unicon Management Corp.* v. *Koppers Co.*, 366 F.2d 199, 204-05 (2d Cir. 1966).

[10] *Santos* v. *Bonanno*, 369 F.2d 369, 370 (2d Cir. 1966); *Huber Baking Co.* v. *Stroehmann Bros. Co.*, 208 F.2d 464, 467 (2d Cir. 1953).

[11] Indeed, while this motion was *sub judice*, the Brotherhood notified employees who were not members of the Brotherhood that they would be cited for non-compliance with the union shop agreement if they failed to make application for membership in the Brotherhood by April 30, 1967.

nor necessary to require these employees to make such a vital decision while their right to maintain membership in the Switchmen's Union alone is being adjudicated. This is particularly so, where the plaintiffs' ultimate rights and remedies may vary markedly according to the course of conduct chosen in the interim. Even if the plaintiffs are eventually successful, their remedy at law may have been rendered wholly inadequate by the course they might choose to protect themselves now.

In sharp contrast, the Brotherhood can show little in the way of potential injury if the defendants are restrained from enforcing the union shop agreement against members of the Switchmen's Union, until the agreement's legality under the Railway Labor Act has been adjudicated. Since the enactment of the 1951 amendments, the Brotherhood has represented crafts and classes of employees on the defendant railroad under union shop provisions explicitly limited by the express language of Section 2, Eleventh (c). No claim has been made on behalf of the Brotherhood that the situation suddenly has become critical, and the Court perceives no precipative circumstance.

Thus, when the present and potential injury to the plaintiffs is weighed against the present and potential injury to the defendants, the balance of convenience inclines heavily on the side of the plaintiffs.[12]

The defendants, singularly and collectively, and their officers, servants and representatives are hereby restrained —pending a final determination of this action—from discharging, or threatening to discharge, or attempting to cause the discharge of the plaintiffs or any other employee of the defendant railroad for failure to join or maintain

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[12] *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966).

membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America.

This opinion constitutes the findings of fact and conclusions of law required under Rules 52 and 65 of the Federal Rules of Civil Procedure.

So ordered.

Dated: New York, N.Y.
April 27, 1967.

WILLIAM B. HERLANDS
U.S.D.J.

(R. 1-17)

Verified Complaint for Injunction, Declaratory Judgment and Damages

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association,

Plaintiffs,

—v.—

ERIE LACKAWANNA RAILROAD COMPANY, a corporation, the BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Defendants.

This is a complaint for injunction, declaratory judgment and damages. This Court has jurisdiction of this complaint under United States Code, Title 28, Section 1337, conferring original jurisdiction upon this Court of any civil action or proceeding arising under any act of Congress regulating commerce, the cause of action herein stated being one for the violation of certain of plaintiffs' rights under the Railway Labor Act, as amended, 45 U.S.C. 151,

et seq. This Court has jurisdiction to grant the declaratory judgment herein prayed pursuant to Section 2201 of the Judicial Code, 28 U.S.C. 2201. The defendant, Erie Lackawanna Railroad Company, operates railroad lines into and out of New York City, within this district. The contract which has been entered into and which the defendants are threatening to apply, in violation of the Railway Labor Act, as hereinafter set forth, is applicable to employees working within this district and defendants have threatened to commit the acts complained of within this district.

1. The plaintiff John P. O'Connell is now, and has for the past five years been, employed by the defendant railroad as a yard service employee. Prior to the merger of the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad in October 1960 to form the defendant railroad, the plaintiff John P. O'Connell had been employed by the Erie Railroad for 20 years. He is now, and at all times for the past 15 years has been, a member of the plaintiff Switchmen's Union.

2. The plaintiff R. A. Gallo is now, and for the past five years has been, employed by the defendant railroad as a yard service employee. Prior to the merger of the Delaware Lackawanna & Western R.R. Co. and the Erie Railroad in October 1960 to form the defendant railroad the plaintiff R. A. Gallo had been employed by the Delaware Lackawanna & Western R.R. Co. for 26 years. He is now, and at all times for the past 29 years has been, a member of the plaintiff Switchmen's Union.

3. The plaintiff Charles Doyle is now, and for the past five years has been, employed by the defendant railroad as

a yard service employee. Prior to the merger of the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad in October 1960 to form the defendant railroad the plaintiff Charles Doyle had been employed by the Erie Railroad for 14 years. He is now, and at all times for the past 15 years has been, a member of the plaintiff Switchmen's Union.

4. The members of the plaintiff Switchmen's Union of North America, AFL-CIO, who are employed by the defendant Erie Lackawanna Railroad Company, exceed 500 in number and constitute a class composed of persons so numerous as to make it impossible to bring them before the court in person. The plaintiffs John P. O'Connell, R. A. Gallo and Charles Doyle are members of this class who will fairly insure the adequate representation of all members of the class for the purpose of this suit.

5. The plaintiff Switchmen's Union of North America, AFL-CIO, is an unincorporated association having its national office and headquarters at 3 Linwood Avenue, Buffalo 2, New York. The plaintiff Switchmen's Union of North America is a labor organization national in scope, organized in accordance with the provisions of Section 2 of the Railway Labor Act, as amended (45 U.S.C. 152) and as such has continuously since adoption of the 1934 amendments to the Railway Labor Act (48 Stat. 926), participated in the selection and designation of the labor members of the National Railroad Adjustment Board.

6. The defendants Griff Davis and W. J. Weil are respectively the General Chairman and the Vice-President of

the Brotherhood of Railroad Trainmen, and are sued both individually and as representatives of a class composed of all the members of the Brotherhood of Railroad Trainmen. The members of the Brotherhood of Railroad Trainmen are so numerous as to make it impossible to bring them all before the court in person. The defendants Griff Davis and W. J. Weil, as officers and members of said labor organization, will fairly ensure the adequate representation of members for the purpose of this suit.

7. The defendant Erie Railroad Company is a corporation organized and existing within the laws of New York and is a carrier within the meaning of Section 1 of the Railway Labor Act, as amended (45 U.S.C. 151).

8. For many years prior to the merger of the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad in October 1960 the plaintiff Switchmen's Union had been the duly designated and recognized representative of the yard service employees employed by the Delaware, Lackawanna & Western R.R. Co. and held the contract for the craft or class of yard foremen, helpers and switchtenders employed by the Delaware, Lackawanna & Western R.R. Co. Prior to the merger the defendant Brotherhood of Railroad Trainmen had been the duly designated and recognized representative of the yard service employees employed by the Erie R.R. Co. and held the contract for the craft or class of yard foremen, helpers and switchtenders employed by the Erie R.R. Co.

9. In 1953 and at all times thereafter until the merger both the plaintiff Switchmen's Union's contract with the Delaware Lackawanna & Western R.R. Co. and the defendant Brotherhood of Railroad Trainmen's contract with the

Erie R.R. Co. contained union shop provisions which conformed in all respects to the provisions of Section 2, Eleventh of the Railway Labor Act as amended (45 U.S.C. 152, Eleventh) and contained the express provision that membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees in any of the services or capacities covered by the first Division of the National Railroad Adjustment Board should satisfy the requirements for membership of the union shop provisions. The union shop provisions of the defendant Brotherhood of Railroad Trainmen's contract was at all times construed and applied so that membership in the plaintiff Switchmen's Union satisfied the requirement for membership. The union shop provisions of the plaintiff Switchmen's Union's contract was at all times construed and applied so that membership in the defendant Brotherhood of Trainmen satisfied the requirement for membership.

10. In March 1964 the National Mediation Board conducted an election among all the yard service employees of the merged railroads which was won by the defendant Brotherhood of Railroad Trainmen which received 43 votes more than the plaintiff Switchmen's Union. The defendant Brotherhood of Railroad Trainmen and the defendant Erie Lackawanna Railroad Company from 1964 until March 14, 1967 construed and applied the union shop provisions of the Trainmen's contract with the defendant railroad as satisfied by membership in the Switchmen's Union and more than 500 employees of the defendant railroad employed in the craft or class of yard foremen, helper and switchtender continued at all times to be members of the plaintiff Switch-

men's Union and did not join or maintain membership in the defendant Brotherhood of Railroad Trainmen.

11. On March 14, 1967 the defendant Erie Lackawanna Railroad Company and the defendant Brotherhood of Railroad Trainmen entered into a collective bargaining agreement effective immediately which required all yard service employees engaged in yard service in the New York Terminal Yards, including Paterson, N. J., Newark, N. J. and Dundee, N. J., Port Jervis, N. Y., Middletown, N. Y., Newburg, N. Y., Syracuse, N. Y., Utica, N. Y. and Scranton, Pa., as a condition of continued employment to become and remain members of the defendant Brotherhood of Railroad Trainmen, a copy of said agreement being attached hereto marked Exhibit A and made a part hereof. Said agreement is illegal and contrary to the provisions of Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act (45 U.S.C. 152, Third, Fourth, Fifth and Eleventh) in that it fails to contain the provisions set forth in Section 2, Eleventh (c) of the Railway Labor Act which require that membership in any other union national in scope organized in accordance with the Railway Labor Act, which admits employees in yard service to membership shall satisfy the requirement of membership in a labor organization which has a union shop agreement. The defendants Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company have threatened and are threatening to discharge the plaintiff John P. O'Connell, R. A. Gallo and Charles Doyle and all the other members of the plaintiff Switchmen's Union who are employed by defendant railroad unless they cease to be members of the plaintiff Switchmen's Union and become and remain members of the defendant Brotherhood

of Railroad Trainmen. By entering into said union shop agreement and by threatening such discharges the defendants and each of them have violated and are threatening to violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act (45 U.S.C. 152, Third, Fourth, Fifth and Eleventh).

12. Said agreement by its terms is effective on March 14, 1967. Unless this Court enters a restraining order protecting the plaintiffs John P. O'Connell, R. A. Gallo and Charles Doyle and the other 500 employees of the defendant railroad from loss of their jobs for failure to join the defendant Brotherhood of Railroad Trainmen, the plaintiffs will be denied their right under the Railway Labor Act to join and be members of the labor organization of their free choice without coercion or restraint by their employer.

13. The constitution of the defendant Brotherhood of Railroad Trainmen, by Section 132, thereof, as more fully appears from a copy of such provision of the constitution of the Brotherhood of Railroad Trainmen as amended in 1964, a copy of which is attached hereto marked Exhibit B and made a part hereof, would not permit the plaintiffs or any other members of the Switchmen's Union to become and remain members of the defendant Brotherhood of Railroad Trainmen because said Switchmen's Union is actively engaged in seeking to gain representation rights for the yard service employees employed by the defendant Erie Lackawanna Railroad Company and now represented by the defendant Brotherhood of Railroad Trainmen.

14. Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their con-

tinued membership in the plaintiff Switchmen's Union, many of them being insured in the Equitable Life Assurance Society under Policy A D S D 16222 issued to them as members of the plaintiff Switchmen's Union and otherwise insured under Aetna Group Policy 7 - 47350, also issued to them as members of the plaintiff Switchmen's Union, all of which constitute valuable property rights which will be lost if they are required to comply with the terms of the above described agreement dated March 14, 1967, which requires them to join the defendant Brotherhood of Railroad Trainmen. Many of the plaintiffs and the class they represent who hold insurance as members of the plaintiff Switchmen's Union will be unable to secure additional or other insurance, and will be left without any insurance if they are required to cease being members of the plaintiff Switchmen's Union.

15. The defendant Erie Lackawanna Railroad Company has threatened to discharge the individual plaintiffs and the members of the class they represent and each of them if they do not join and remain members of the defendant Brotherhood of Railroad Trainmen, all of which threats are in violation of Section 2 of the Railway Labor Act as amended.

16. The defendant Erie Lackawanna Railroad Company violated Section 2, Fifth of the Railway Labor Act by entering into an agreement with the defendant Brotherhood of Railroad Trainmen requiring the plaintiffs and the members of the class they represent to join and remain members of the defendant Brotherhood of Railroad Trainmen.

17. The requirement that the plaintiff and the other members of the class they represent must join and maintain

membership in the defendant Brotherhood of Railroad Trainmen as a condition of employment deprives said persons and each of them of the right to join and remain members of the union of their own choice. Even if the constitution of the defendant Trainmen's Union is not enforced to expel from the Trainmen or deny membership in the Trainmen to plaintiffs and members of the class they represent because of membership in the Switchmen's Union, the plaintiffs and the members of the class they represent cannot afford to pay initiation fees and dues to two unions.

18. Each of the plaintiffs and each of the other members of the class they represent has seniority rights entitling him to preferential employment by the defendant railroad which constitute valuable property rights which will be lost in the event of a discharge for failure to join and maintain membership in the defendant Brotherhood of Trainmen as required by said agreement of March 14, 1967.

19. The plaintiff Switchmen's Union of North America is a labor organization engaged in representing employees in yard service on carriers throughout the United States, and as such it and its members are protected by Section 2 of the Railway Labor Act, as amended, from acts of carriers, including the defendant Erie, Lackawanna Railroad Company, which interfere with or coerce employees, including the plaintiff employees and the other members of the class they represent in exercise of their right to join and designate the Switchmen's Union as their representative.

20. The membership of the plaintiff employees in the plaintiff Switchmen's Union constitutes a valuable contract

and property right of each of the plaintiffs and the conduct of the defendants and each of them has unlawfully interfered with such contract and property rights.

21. The conduct of the defendants and each of them has caused and threatens to cause each of the plaintiffs and each of the members of the class they represent irreparable injury for which no remedy in damages is available.

22. The conduct of each of the defendants has caused the plaintiff Switchmen's Union of North America damages in that employees on the defendant railroad and other employees on all railroads where the Brotherhood of Railroad Trainmen hold contracts have become afraid that they will lose their jobs unless they cease being members of the Switchmen's Union and join the defendant Railroad Trainmen and have become afraid to join the Switchmen's Union for fear of loss of their jobs, all of which has caused the plaintiff Switchmen's Union damages in the sum of One Hundred Thousand Dollars.

WHEREFORE, the plaintiffs pray:

1. That this Court issue a temporary restraining order pending hearing on the motion for preliminary injunction and issue a preliminary injunction pending hearing on the merits and then a permanent injunction restraining the defendants, and each of them, and their officers, agents, servants and representatives from discharging, or threatening to discharge, or attempting to cause the discharge of the plaintiffs or any other employee of the defendant railroad for failure to join or maintain membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America.

2. That this Court declare that the agreement dated March 14, 1967 between the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen violates Section 2, Fifth and Eleventh (c) of the Railway Labor Act, as amended, and hence is null and void and of no effect.

3. That the Court award plaintiff Switchmen's Union of North America damages in the sum of One Hundred Thousand Dollars against the defendants Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company and each of them.

4. That the Court award the plaintiffs attorney's fees, costs, expenses and such other and further relief as the case may require.

ALAN F. PERL
150 Broadway
New York City

LEE LEIBIK
RUTH WEYAND
343 South Dearborn Street
Chicago, Illinois 60604

Dated: this 31st day of March, 1967

(Duly Verified March 31, 1967.)

Exhibit A Annexed to Complaint

Memorandum of Agreement

Between

The Erie Lackawanna Railroad Company

And Its Employees Represented By

The Brotherhood of Railroad Trainmen

(Eastern District)

1. It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N. J., Newark, N. J. and Dundee, N. J., Port Jervis, N. Y., Middletown, N. Y., Newburg, N. Y., Syracuse, N. Y., Utica, N. Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen.

Exhibit A Annexed to Complaint

2. Every employee shall be considered by the Erie Lackawanna Railroad Company to be either a member of the Brotherhood as provided for herein, or as having been denied membership in the Brotherhood, unless the Company is advised to the contrary in writing. The Brotherhood of Railroad Trainmen shall be responsible for initiating action to enforce the terms of this agreement.

3. Employees promoted to official or other positions who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this agreement; provided, that if such employee shall have terminated membership during their official capacity, they shall, when returning to service represented by the Brotherhood of Railroad Trainmen (Eastern District), come under the provisions of Item 1 of this agreement.

4. Employees furloughed through reduction in force, sickness or leave of absence, etc., who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this agreement, but shall, upon resumption of employment, come under Item 1 of this agreement.

5. The seniority status and rights of employees furloughed to serve in the Armed Forces shall not be terminated by reason of any of the provisions of this agreement but shall, upon resumption of employment, come under Item 1 of this agreement.

Exhibit A Annexed to Complaint

6. An employee retired on disability annuity under the Railroad Retirement Act at an age earlier than 65 and who retains seniority until he reaches the age of 65, shall not have his seniority status and rights terminated by reason of non-compliance with the provisions of this agreement. If employee returns to active service, he shall come under Item 1 of this agreement.

7. Notice of alleged non-compliance with the provisions of this agreement of an individual employee coming under Item 1 of this agreement shall be given in writing by the General Chairman (or his designated representative) of the Brotherhood of Railroad Trainmen (Eastern District) to the Superintendent not earlier than the expiration of the sixty calendar day period from the date of employment. If after hearing, as provided for in Item 8 hereof, it is determined that the seniority of such employee is to be terminated by reason of non-compliance with the provisions of this agreement, such termination will not be required to be effected until such time as a qualified replacement is available.

8. (a) Release of any employee from the service of the Erie Lackawanna Railroad Company and/or the termination of seniority rights and employment relationship because of non-compliance with the provisions of this agreement shall not be made without written notice. Hearing will be granted if the employee so requests in writing within ten (10) days from receipt of such notice and hearing will be held within ten (10) days from date of receipt of employee's request. A decision shall be rendered within twenty (20) days from date of hearing.

Exhibit A Annexed to Complaint

(b) Discipline rules contained in existing agreements between the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen (Eastern District) will not apply to cases arising under this agreement.

9. Employees whose services are terminated for non-compliance with the provisions of this agreement shall be regarded as having terminated their employee relationship.

10. An employee dropped from the service, as provided for in Item 8 hereof, account of non-compliance with the provisions of this agreement shall not thereafter be restored to the service except as a new employee.

11. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a Special Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of two members, one to be appointed by the Erie Lackawanna Railroad Company and one by the Brotherhood of Railroad Trainmen.

(b) After hearing is granted under Item 8 hereof, an employee who is notified that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall be given a hearing if he submits a request in writing to the General Manager-Labor Relations within a period of ten (10) calendar days from the date of receipt of decision rendered under Item 8. The employee will be notified in writing of the time and place at which such hearing will be held.

Exhibit A Annexed to Complaint

(c) The decision of the Special Board of Adjustment shall be by majority vote and shall be final and binding.

(d) In the event the Special Board of Adjustment is unable to reach a decision, the matter will be submitted to a neutral arbitrator to be selected by the parties or the National Mediation Board, whose decision as to whether or not the employee has complied with the provisions of this agreement shall be final and binding.

(e) Receipt by the Erie Lackawanna Railroad Company of notice from an employee that he wishes to dispute the charge that he has failed to comply with the membership requirements of this agreement shall operate to stay action on the termination of his seniority and employment pending final decision and for a period of ten (10) calendar days thereafter.

12. The time periods specified in this agreement may be extended in individual cases by written agreement between the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen (Eastern District).

13. No part of this agreement shall be used in any manner whatosever as a basis for a grievance or time claim by or on behalf of any employee; and no part of the schedule agreement covering rates of pay and working conditions shall be used as a basis for a grievance or time claim by or on behalf of any employee predicated upon an alleged violation, misapplication or non-compliance with any part of this agreement relating to Union Shop.

14. This agreement is in full, final and complete settlement of the dispute growing out of the request contained in

the notice served on the Erie Lackawanna Railroad Company on January 30, 1967 by the Brotherhood of Railroad Trainmen (Eastern District). This agreement shall become effective March 14, 1967 and shall remain in effect until revised or cancelled in accordance with the provisions of the Railway Labor Act, as amended.

FOR THE EMPLOYEES REPRESENTED
BY THE BROTHERHOOD OF RAILROAD
TRAINMEN (EASTERN DISTRICT)

/s/ GRIFF DAVIS
GRIFF DAVIS
General Chairman

FOR THE ERIE LACKAWANNA
RAILROAD COMPANY

/s/ R. A. CARROLL
R. A. CARROLL
General Manager-
Labor Relations

APPROVED:

/s/ W. J. WEIL
W. J. WEIL
Vice President

Cleveland, Ohio

Date: March 14, 1967

Exhibit B Annexed to Complaint

CONSTITUTION

BROTHERHOOD OF RAILROAD TRAINMEN

Effective January 1, 1965

Page 96 — Sec. 132

"A member employed in the class of service covered by a Brotherhood contract with his employer, who joins or becomes a member of any other labor organization that contends to represent employes in such service on such property, shall be expelled.

"A member who influences or attempts to influence any member to join another labor organization that presumes or contends to represent the class of employes represented by the Brotherhood, shall be expelled."

(R. 18-38)

Verified Answer of The Brotherhood of Railroad Trainmen, and W. J. Weil

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Brotherhood of Railroad Trainmen, an unincorporated association, and W. J. Weil, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, two of the defendants above named, by their attorney, Arnold B. Elkind, as and for an answer to the complaint herein allege as follows:

1. Answering the introductory paragraph of the complaint, these defendants deny that this Court has jurisdiction over those parts of the complaint which advance a construction of the provisions of a collective bargaining agreement because Congress has granted exclusive jurisdiction over these matters to the National Railroad Adjustment Board, *Slocum* v. *Delaware, Lackawanna & Western Ry. Co.*, 339 U.S. 239, and to system, group or regional Boards of Adjustment as authorized by Public Law 89-456, §§1, 2, 80 Stat. 208, 209; June 20, 1966.

Further answering the introductory paragraph of the complaint, these defendants deny that this Court has jurisdiction to determine whether the terms of the collective bargaining agreement comply with the provisions of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, until after the individually named employee-plaintiffs have exhausted the procedures of the contract.

Verified Answer of The Brotherhood of Railroad Trainmen, and W. J. Weil

Further answering the introductory paragraph of the complaint, these defendants deny that the collective bargaining agreement entered into on March 14, 1967 violates any provision of the Railway Labor Act, or any other Federal statute.

2. Deny knowledge or information sufficient to form a belief as to each and every allegation of paragraphs 1, 2, 3, 4, 5, 14 and 15 of the complaint herein.

3. Admit that the defendants, Griff Davis and W. J. Weil, are respectively the General Chairman and the Vice President of the Brotherhood of Railroad Trainmen, and that the members of the Brotherhood of Railroad Trainmen are so numerous as to make it impossible to bring them all before the Court in person, but otherwise deny the allegations of paragraph 6 of the complaint herein.

4. Deny that the Switchmen's Union of North America has ever been the duly designated and recognized representative of employees of the Erie Lackawanna Railroad Company, and allege that the Brotherhood of Railroad Trainmen, pursuant to an election conducted by the National Mediation Board in March of 1964, is the duly certified representative of all yard service employees of the Erie Lackawanna Railroad Company and has, since 1964, been the duly certified collective bargaining representative for all employees of the defendant railroad employed in the craft or class of yard foremen, helpers, switchtenders, including many employees who pay dues to the Switchmen's Union and who have not paid dues to the Brotherhood of Railroad Trainmen, and except for these allegations these defendants deny knowledge or information as to the alle-

gations contained in paragraphs 8, 9 and 10 of the complaint herein.

5. Admit that Exhibit A annexed to the complaint is a true copy of an agreement entered into between the defendant, Brotherhood of Railroad Trainmen, and the defendant, Erie Lackawanna Railroad Company, and otherwise deny each and every allegation of paragraph 11 of the complaint herein.

6. Deny paragraphs of the complaint herein numbered 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, and each and every allegation thereof.

As and for a First Affirmative Defense

7. These defendants allege that the complaint herein fails to state a claim upon which relief can be granted.

As and for a Second Affirmative Defense

8. These defendants allege that the matters complained of involve the interpretation or application of a collective bargaining contract which provides for arbitration of disputes arising thereunder in accordance with the terms thereof, and these arbitration procedures constitute the sole and exclusive remedy for the individual plaintiffs.

As and for a Third Affirmative Defense

9. That insofar as the matters complained of involve an interpretation of the Constitution of the Brotherhood of Railroad Trainmen, said Constitution provides for a system of hearings, appeals and administrative remedies within

the Brotherhood of Railroad Trainmen, and the plaintiffs have failed to exhaust their administrative remedies, and this Court therefore has no jurisdiction over the subject matter thereof.

As and for a Fourth Affirmative Defense and By Way of Counterclaim

10. That at all times herein material the Brotherhood of Railroad Trainmen was an unincorporated association and a labor organization engaging in collective bargaining in the railroad industry, and the plaintiff, Switchmen's Union of North America, was an unincorporated association and a labor organization engaging in collective bargaining in the railroad industry.

11. That at all times herein material, and since March of 1964, the Brotherhood of Railroad Trainmen has been the duly certified collective bargaining representative of the yard men, switchtenders, conductors, ticket collectors, baggage men, trainmen and yard service employees on the Erie Lackawanna Railroad Company, and has expended in the past, and will continue to expend in the future, substantial sums of money for the negotiation of agreements affecting the working conditions, wages, fringe benefits, penalty payments, operating rules, disciplinary rules, roster agreements, implementation agreements, legislative activities, appeals involving interpretation of rules, representation of employees charged with violations of company rules, representation of employees having grievances against management, and the like. To support these expenses the Brotherhood of Railroad Trainmen charges dues and assessments which are paid by members of the Brotherhood of Railroad Trainmen.

12. That the Switchmen's Union of North America at no time herein material has been the collective bargaining agent for the employees represented by the Brotherhood of Railroad Trainmen, but has nevertheless competed with the Brotherhood for membership among the employees represented by the Brotherhood of Railroad Trainmen, offering them as an inducement to membership the fact that the dues requirements are lower than those paid by members of the Brotherhood of Railroad Trainmen.

13. That on or about the 31st day of March, 1967, the plaintiff, Switchmen's Union of North America, wilfully and maliciously published false, defamatory and libelous statements concerning the Brotherhood of Railroad Trainmen, in which a union shop agreement was described as a "Slave Labor Agreement", and in which it was said that the agreement "is intended to place all yard and train service employees in 'Bondage' and deny them their democratic right of belonging to a Union of their choice", and in which it was said that the BRT "now intend to totally destroy the last vestige of what little democracy may have existed in an Organization already laden with dictatorial policy", and in which a false copy of the union shop agreement was annexed, omitting therefrom all individual safeguards negotiated as a part of said union shop agreement for the members of the Switchmen's Union of North America affected thereby. A true copy of the libel of March 31, 1967 is annexed hereto as Exhibit A.

14. That on or about February 15, 1967 the plaintiff, John P. O'Connell, on behalf of the Switchmen's Union of North America, wilfully and maliciously published, and

thereafter circulated amongst the employees of the Erie Lackawanna Railroad Company, a certain letter describing a similar union shop agreement, since held legal by the U.S. District Court in Chicago, Illinois, as a BRT slave labor agreement, and untruthfully and maliciously asserting that said agreement made Switchmen slaves to the Brotherhood of Railroad Trainmen, and untruthfully alleging that "Under this 'Slave Labor Agreement' the BRT becomes a dictator over your wages and working conditions", and asserting that an immediate representation election would soon be sought so that employees "can escape the forced servitude of a BRT 'Slave Labor Agreement' ", and that "It is no longer a choice of which Union—but a choice of Freedom or Dictatorship". A true copy of said libelous letter of February 15, 1967 is annexed hereto as Exhibit B.

15. That on and after February 13, 1967 the Switchmen's Union of North America, through its President, caused to have circulated amongst the employees of the Erie Lackawanna Railroad a certain letter dated February 13, 1967 addressed to the members of the Switchmen's Union employed by the Milwaukee Railroad, in which the union shop agreement was described as a slave labor agreement and in which the said Switchmen's Union described membership in the Brotherhood of Railroad Trainmen as "Dictatorship with no voice in the affairs of their Union". A true copy of the libelous statement of February 13, 1967 is annexed hereto as Exhibit C.

16. That the aforesaid statements by the Switchmen's Union of North America and by the plaintiff, John P.

O'Connell, were false and known to be false, and were made by the plaintiffs for the malicious purpose of discrediting the Brotherhood of Railroad Trainmen as responsible collective bargaining agent with the dues paying employees represented by the Brotherhood of Railroad Trainmen and belonging to the Brotherhood of Railroad Trainmen, and for the further malicious purpose of discouraging members of the Switchmen's Union of North America from joining the Brotherhood of Railroad Trainmen.

17. That prior to the aforesaid publications by the Switchmen's Union of North America, and for many years, the Brotherhood of Railroad Trainmen has enjoyed a reputation in the railroad industry and amongst employees for performing their duties as collective bargaining representatives in a lawful, ethical and professional manner and in such a way as to carry out the normal collective bargaining objectives of improving wages, working conditions and job security for the railroad workers who they represent, and for handling their grievances in a proper and professional manner, and for seeking appropriate legislative and administrative relief in those situations requiring legislative and administrative relief, and for conducting its internal affairs in a constitutional and democratic way and in accordance with all existing laws and regulations having application to unincorporated associations engaged in collective bargaining in the railroad industry.

18. That the aforesaid libelous statements falsely accused the Brotherhood of Railroad Trainmen of enslaving its members and of being dictatorial, and of an intent to discharge employees for belonging to the Switchmen's Union of North America.

19. That the aforesaid libelous statements thereby accused the Brotherhood of Railroad Trainmen of violating the laws of the United States pertaining to labor unions, and accused them of violating the 13th Amendment of the Constitution of the United States prohibiting involuntary servitude and slavery, and further inferred that the defendant, Brotherhood of Railroad Trainmen, was not carrying out its lawful function as a collective bargaining agent.

20. That the Brotherhood of Railroad Trainmen has been damaged in its professional reputation as collective bargaining agents by reason of the aforesaid wilful and malicious libels.

21. That the Brotherhood of Railroad Trainmen has sustained, and will continue to sustain, damage as a result of the libelous statements of the Switchmen's Union of North America and John P. O'Connell, and has expended, and will be required to expend, substantial sums of money to maintain its position as the duly certified collective bargaining representative of the employees of the Erie Lackawanna Railroad and of other railroads throughout the United States, and the Brotherhood of Railroad Trainmen has been otherwise damaged by reason of the libels of the plaintiffs as aforesaid.

22. That the Brotherhood of Railroad Trainmen is entitled to punitive damages from the plaintiff, Switchmen's Union of North America, in the sum of $300,000.00; upon information and belief, the treasury of said unincorporated association had a balance of approximately $400,000.00 according to its latest report, but may assess

its members for additional amounts should the need require.

23. That the Brotherhood of Railroad Trainmen estimates that it has been damaged by said libels and by the repercussions thereof in the sum of $100,000.00.

WHEREFORE, the defendants, Brotherhood of Railroad Trainmen and W. J. Weil, demand judgment denying all requested injunctive relief and dismissing the complaint, with costs and attorneys fees, and the defendant, Brotherhood of Railroad Trainmen, demands judgment against the Switchmen's Union of North America in the sum of Four Hundred Thousand ($400,000.00) Dollars, together with the costs and disbursements of this action, and against John P. O'Connell in the sum of One Hundred Thousand ($100,000.00) Dollars, together with the costs and disbursements of this action.

ARNOLD B. ELKIND
Attorney for Defendants, Brotherhood of Railroad Trainmen and W. J. Weil
122 East 42nd Street
New York, N. Y. 10017
YUkon 6-4921

(Duly Verified April 5, 1967.)

Exhibit "A" Annexed to Answer

(EMBLEM)

SWITCHMEN'S UNION
OF NORTH AMERICA—A.F.L.—C.I.O.

HEADQUARTERS
3 LINWOOD AVE. • BUFFALO, N. Y. 14202

March 31, 1967

MEMBERS-SWITCHMEN'S UNION
EMPLOYED BY ERIE-LACKAWANNA RAILROAD

Dear Sirs and Brothers:

A new type of Union Shop Agreement was recently negotiated by the BRT with Management of the Erie-Lackawanna Railroad (Lines East) which is as we understand it will become effective May 1, 1967. The BRT call it a "Union Security Agreement". The Switchmen call it a "Slave Labor Agreement" since the Agreement is intended to place all yard and train service employees in "Bondage" and deny them their democratic right of belonging to a Union of their choice.

In general the provisions of this "Slave Labor Agreement" are intended to require that Switchmen (yardmen) employed on the Erie-Lackawanna (Lines East) must become and remain members of the BRT through their remaining years of employment with the Erie-Lackawanna Railroad.

The Agreement is negotiated only for the purpose of perpetuating the BRT in office through compulsion. Thus, they (BRT) now intend to totally destroy the last vestige of what little democracy may have existed in an Organization already laden with dictatorial policy.

Exhibit "A" Annexed to Answer

The Switchmen's Union is filing a law suit on the basis that the Agreement violates Section 2, Eleventh of the Railway Labor Act which has for the past fifteen years legally permitted Operating Employees in the Railroad industry a choice of belonging to a Union, national in scope, organized in accordance wtih the Railway Labor Act and admitting to membership employees of the craft or class.

The Switchmen's Union will move initially for an order to restrain the application of the Agreement until the Courts have had an opportunity to determine the legality of the Agreement.

We cannot advise you at this date whether the Court will issue a restraining order. However, we will advise you by letter prior to May 1, 1967 the effective date of the Agreement, if we have been successful in restraining the application of the Agreement and if not—what your personal course of action should be.

We have attached hereto a copy of the pertinent part of the BRT "Slave Labor Agreement" which applies to Erie-Lackawanna Switchmen (Yardmen) (Lines East) who are employed in the following yards: Hoboken, Jersey City, Syracuse, Utica and Scranton.

Although this Agreement does not presently apply on Lines West, you can expect BRT to continue to follow this policy until they are estopped by the Courts.

Fraternally yours,

/s/ VINCENT MASTRONARDI
Vincent Mastronardi
General Chairman

Enc.

Exhibit "A" Annexed to Answer

MEMORANDUM OF AGREEMENT

Between

THE ERIE LACKAWANNA RAILROAD COMPANY

And Its Employees Represented By

THE BROTHERHOOD OF RAILROAD TRAINMEN

(Eastern District)

1. It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N. J., Newark, N. J. and Dundee, N. J., Port Jervis, N. Y., Middletown, N. Y., Newburg, N. Y., Syracuse, N. Y., Utica, N. Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen.

Exhibit "A" Annexed to Answer

FOR THE ERIE LACKAWANNA
RAILROAD COMPANY

/s/ R. A. CARROLL
R. A. Carroll
General Manager-
Labor Relations

FOR THE EMPLOYEES REPRESENTED
BY THE BROTHERHOOD OF
RAILROAD TRAINMEN
(EASTERN DISTRICT)

/s/ GRIFF DAVIS
Griff Davis
General Chairman

APPROVED:

/s/ W. J. WEIL
W. J. Weil
Vice President

Cleveland, Ohio

Date: March 14, 1967

Exhibit "B" Annexed to Answer

(EMBLEM)

SWITCHMEN'S UNION
OF NORTH AMERICA—A.F.L.—C.I.O.

HEADQUARTERS
3 LINWOOD AVE. • BUFFALO, N. Y. 14202

February 15, 1967

ALL SWITCHMEN
ERIE-LACKAWANNA RAILROAD

Dear Sirs and Brothers:

HAVE YOU BEEN INFORMED ABOUT THE RECENT "BRT SLAVE LABOR AGREEMENT?"

This Agreement making Switchmen "SLAVES" to the BRT was recently negotiated by the Brotherhood of Railroad Trainmen on the Milwaukee Railroad and is to be effective March 1, 1967.

Attached hereto is the pertinent section of the Agreement which binds Milwaukee Switchmen to exclusive membership in the BRT and subjects a Switchman to discharge and loss of his job if he joins another Union.

Under this "Slave Labor Agreement" you lose all right to protest the amount of Union dues you can be forced to pay and the type of representation you are to receive.

Under this "Slave Labor Agreement" the BRT becomes a dictator over your wages and working conditions.

The Switchmen's Union is filing a law suit on the basis that the BRT "Slave Labor Agreement" (on the Milwaukee) violates Section 2, Eleventh of the Railway Labor Act which has for the past fifteen years legally permitted

Exhibit "B" Annexed to Answer

Operating Employees in the Railroad industry a choice of belonging to a Union, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of the craft or class.

The Switchmen's Union will move initially for an order to restrain the application of this infamous Agreement on the Milwaukee until the Courts have had an opportunity to determine its legality.

We have lost two elections on this property by very small majorities. Our two year moratorium is almost finished. We will soon be in position to request another representation election.

Switchmen employed on the Erie-Lackawana by working to bring about an immediate representation election can escape the forced servitude of a BRT "Slave Labor Agreement".

It is no longer a choice of which Union—but a choice of Freedom or Dictatorship.

Fraternally yours,

/s/ JOHN P. O'CONNELL
JOHN P. O'CONNELL
Local Chairman
NA Local 298

"Exhibit B, which was annexed to the original Answer has not been reprinted. It consists of a reproduction of the opening paragraph and one section of a union shop agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen dated February 1, 1967."

Exhibit "C" Annexed to Answer

(EMBLEM)

SWITCHMEN'S UNION
OF NORTH AMERICA—A.F.L.—C.I.O.

HEADQUARTERS
3 LINWOOD AVE. • BUFFALO, N. Y. 14202

NEIL P. SPEIRS
International President

DANIEL W. COLLINS
International Secy-Treas.

February 13, 1967

MEMBERS—SWITCHMEN'S UNION
Employed by Milwaukee Railroad

Dears Sirs and Brothers:

A new "Slave Labor Agreement" was recently negotiated by the BRT on the Milwaukee Railroad and is to be effective March 1, 1967.

In general the provisions of the Agreement are intended to require that Switchmen (Yardmen) employed on the Milwaukee Railroad must become members of the BRT on the effective date of the Agreement, March 1, 1967.

The Switchmen's Union is filing a law suit on the basis that the Agreement violates Section 2, Eleventh of the Railway Labor Act which has for the past fifteen years legally permitted Operating Employees in the Railroad industry a choice of belonging to a Union, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of the craft or class.

The Switchmen's Union will move initially for an order to restrain the application of the Agreement until the Courts have had an opportunity to determine the legality of the Agreement.

Exhibit "C" Annexed to Answer

We cannot advise you at this date whether the Court will issue a restraining order. However, we will advise you by letter prior to March 1, 1967 the effective date of the Agreement, if we have been successful in restraining the application of the Agreement and if not—what your personal course of action should be.

We have attached hereto a copy of the pertinent part of the BRT "Slave Labor Agreement" which applies to Milwaukee Switchmen (Yardmen).

In the forthcoming Representation Election among Switchmen on the Milwaukee Railroad, Switchmen will have the opportunity to determine whether they want *Freedom and Democracy* by supporting and voting for the Switchmen's Union or whether they wish to accept Dictatorship with no voice in the affairs of their Union.

Fraternally yours,

/s/ NEIL P. SPEIRS
NEIL P. SPEIRS
International President

NPS:bl
Enc.

"Exhibit C is also a reproduction of an abbreviated union shop agreement in effect on the Chicago, Milwaukee, St. Paul & Pacific Railroad."

(R. 69-73)

Verified Answer of Defendant, Erie Lackawanna Railroad Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Erie Lackawanna Railroad Company, a corporation by its attorney, Raymond H. Branda, Esq., as and for an answer to the complaint herein alleges as follows:

1. Answering the introductory paragraph of the complaint, this defendant denies that this Court has jurisdiction over those parts of the complaint which advance a construction of the provisions of a collective bargaining agreement because Congress has granted exclusive jurisdiction over these matters to the National Railroad Adjustment Board, *Slocum* v. *Delaware, Lackawanna & Western Ry. Co.*, 339 U.S. 239, and to system, group or regional Boards of Adjustment as authorized by Public Law 89-456, §§1, 2, 80 Stat. 208, 209; June 20, 1966.

Further answering the introductory paragraph of the complaint, this defendant denies that this Court has jurisdiction to determine whether the terms of the collective bargaining agreement comply with the provisions of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, until after the individually named employee-plaintiffs have exhausted the procedures of the contract.

Further answering the introductory paragraph of the complaint, this defendant denies that the collective bargaining agreement entered into on March 14, 1967, violates any provision of the Railway Labor Act, or any other Federal statute.

Verified Answer of Defendant, Erie Lackawanna Railroad Company

2. Admits paragraphs 1, 2, 3, 5 and 7 of the complaint.

3. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 4, 13 and 14 of the complaint.

4. Answering paragraph 6 of the complaint, this defendant alleges that the said paragraph does not pertain to it and therefore neither admits nor denies the allegations contained therein.

5. Denies that the Switchmen's Union of North America has ever been the duly designated and recognized representative of employees of the Erie Lackawanna Railroad Company, and allege that the Brotherhood of Railroad Trainmen, pursuant to an election conducted by the National Mediation Board in March of 1964, is the duly certified representative of all yard service employees of the Erie Lackawanna Railroad Company and has, since 1964, been the duly certified collective bargaining representative for all employees of the defendant railroad employed in the craft or class of yard foremen, helpers, switchtenders, including many employees who pay dues to the Switchmen's Union and who have not paid dues to the Brotherhood of Railroad Trainmen, and except for these allegations this defendant denies knowledge or information as to the allegations contained in paragraphs 8, 9 and 10 of the complaint herein.

6. Answering paragraph 11 of the complaint, this defendant admits that on March 14, 1967, the defendant Brotherhood of Railroad Trainmen and the defendant Erie Lackawanna Railroad Company entered into an agreement.

Further answering said paragraph 11 to the complaint, this defendant denies that said agreement by its terms is

in violation of Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act, as amended (45 U.S.C. 152 Third Fourth, Fifth and Eleventh) in that said agreement requires all employees covered thereby as a condition of employment to become and remain members of the defendant Brotherhood of Railroad Trainmen within sixty days after the effective date of the agreement, without providing that as to all employees covered by said agreement membership in any other labor organization national in scope which admits to membership employees within the craft or class, yard service shall satisfy the requirement of membership as required by said agreements is made mandatory by Section 2, Eleventh (c) of the Railway Labor Act, as amended.

7. This defendant denies each and every allegation set forth in paragraphs 15, 16, 17, 18, 19, 20, 21, and 22 of the complaint.

As and for a First Affirmative Defense

8. This defendant alleges that the complaint herein fails to state a claim upon which relief can be granted.

As and for a Second Affirmative Defense

9. This defendant alleges that the matters complained of involve the interpretation or application of a collective bargaining contract which provides for arbitration of disputes arising thereunder in accordance with the terms thereof, and these arbitration procedures constitute the sole and exclusive remedy for the individual plaintiffs.

As and for a Third Affirmative Defense

10. This defendant alleges that the plaintiffs have failed to exercise administrative remedies available to them under

various provisions which are upon information and belief contained in the constitution of Brotherhood of Railroad Trainmen and that this Court, therefore, has no jurisdiction over the subject matter herein.

WHEREFORE the defendant Erie Lackawanna Railroad Company demands judgment denying all requested injunctive relief and dismissing the complaint together with costs and attorneys fees.

Dated: April 18, 1967

RAYMOND H. BRANDA
Attorney for Defendant
Erie Lackawanna Railroad Company
140 Cedar Street
New York, New York 10006
BArclay 7-2500

To:

ARNOLD B. ELKIND
Attorney for Defendants
Brotherhood of Railroad Trainmen
and W. J. Weil
122 East 42nd Street
New York, New York 10017

LEE LEIBIK, ESQ.
c/o STURM & PERL, ESQS.
Attorneys for Plaintiffs
150 Broadway
New York, New York

(Duly Verified April 18, 1967.)

(R. 372-415)

Requests for Admission Under Rule 36
Dated May 23, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

Defendant, BROTHERHOOD OF RAILROAD TRAINMEN, requests the plaintiffs, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents exhibited with this request is genuine:

(A) Agreement between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Lines East) and the Brotherhood of Railroad Trainmen dated February 1, 1967.

(B) Agreement between Central Railroad Company of New Jersey, New York and Long Branch Railroad Company and Brotherhood of Railroad Trainmen dated March 15, 1967.

(C) Agreement between Reading Company and Brotherhood of Railroad Trainmen dated March 15, 1967.

(D) Agreement between Cambria and Indiana Railroad Company, Conemaugh & Black Lick Rail-

road Company, Patapsco & Back Rivers Railroad Company, Philadelphia, Bethlehem and New England Railroad Company, South Buffalo Railway Company, and Steelton & Highspire Railroad Company and United Steelworkers of America, dated August 14, 1962.

(E) Agreement between Port Authority Trans-Hudson Corporation and Brotherhood of Locomotive Engineers, dated September 21, 1966.

(F) Agreement between Richmond, Fredericksburg and Potomac Railroad Company and Brotherhood of Locomotive Engineers, dated December 20, 1966.

(G) Agreement between Boston and Maine Corporation and Brotherhood of Railroad Trainmen, dated July 13, 1966.

(H) Certification of the National Mediation Board, dated June 23, 1954, designating the United Steelworkers of America, CIO, to represent the craft or class of Locomotive Engineers on the Conemaugh & Black Lick Railroad Company.

(I) Certification of National Mediation Board, dated October 1, 1947, designating the United Steelworkers of America, CIO, to represent the craft or class of Locomotive Engineers on the Conemaugh & Black Lick Railroad Company.

(J) Certification of the National Mediation Board, dated April 23, 1937, designating the Brotherhood of Railroad Trainmen to represent con-

ductors, brakemen, yard foremen, yard helpers and switchtenders, and the Brotherhood of Locomotive Firemen and Enginemen to represent locomotive engineers, firemen, hostlers and engine inspectors, on the Conemaugh & Black Lick Railroad.

(K) Certification of the National Mediation Board, dated May 16, 1944, certifying a continuation of representation by the Brotherhood of Locomotive Firemen and Enginemen for the craft of Locomotive Engineers and certifying United Steelworkers as the representative for the crafts of Locomotive Firemen, Hostlers and Hostler Helpers and Yardmen (Foremen, Helpers and Switchtenders), on the Conemaugh & Black Lick Railroad.

2. That each of the following statements is true:

(A) That the Brotherhood of Railroad Trainmen, at the time of the commencement of this action and for a number of years prior thereto, was the exclusive bargaining agent, duly certified as such by the National Mediation Board, for the employees in the crafts or class of conductors, ticket collectors, baggagemen, trainmen, and yard service employees working in both road and yard service for the Erie Lackawanna Railroad Company.

(B) That the Brotherhood of Railroad Trainmen and the Erie Lackawanna Railroad Company are currently parties to written collective bargain-

ing agreements containing provisions for rates of pay, hours of work, health and welfare benefits, seniority rights, union security, and numerous other terms and conditions of employment for the employees working in yard and road service.

(C) That all employees on the Erie Lackawanna Railroad within the crafts or classes represented by the Brotherhood of Railroad Trainmen receive the benefits of said collective bargaining agreements, including the individual plaintiffs, the individual intervening plaintiffs, and those employees paying dues to the Switchmen's Union of North America and/or the Order of Railway Conductors and Brakemen.

(D) That the Switchmen's Union of North America is not now, and has not been for several years, certified by the National Mediation Board as the bargaining representative of any employees of any class or craft on the Erie Lackawanna Railroad.

(E) That the Order of Railway Conductors and Brakemen is not now, and has not been for several years, certified by the National Mediation Board as the bargaining representative of any employees of any class or craft on the Erie Lackawanna Railroad.

(F) That at no time material to this proceeding, nor at the time of the commencement of this action, has either the Switchmen's Union of North

Requests for Admission Under Rule 36
Dated May 23, 1967

America or the Order of Railway Conductors and Brakemen been recognized by the Erie Lackawanna Railroad Company as the exclusive bargaining agent for any employees of any class or craft performing services on the Erie Lackawanna Railroad.

(G) That neither at the time of the commencement of this proceeding nor at any time material, have either the Switchmen's Union of North America or the Order of Railway Conductors and Brakemen been a party to any collective bargaining agreement with the Erie Lackawanna Railroad Company.

(H) That the Brotherhood of Railroad Trainmen, as the exclusive bargaining agent of all the employees in the class or crafts which it represents with the Erie Lackawanna Railroad Company, is under an enforceable obligation to represent all employees covered by the agreement, whether or not they are members of the Brotherhood of Railroad Trainmen.

(I) That there have been no discharges by the Erie Lackawanna Railroad pursuant to the union shop agreements of March 14, 1967 (Eastern District) and April 4, 1967 (Western District).

(J) That there has been no threat made to discharge any employee purported to be covered by the union shop agreements dated March 14, 1967 and April 4, 1967, by the Erie Lackawanna Railroad Company.

Requests for Admission Under Rule 36
Dated May 23, 1967

(K) That no individual has invoked any of the procedures contained in the union shop agreements annexed to the complaint.

(L) That members of the Switchmen's Union of North America and members of the Order of Railway Conductors and Brakemen do not contribute in any way to meeting the expense of maintaining the General Grievance Committee of the Brotherhood of Railroad Trainmen on the Erie Lackawanna Railroad.

(M) That none of the plaintiffs, or other members of the class or crafts they assert to represent in this proceeding, hold employment rights with the Erie Lackawanna Railroad in any craft or class other than those classifications which are exclusively represented on the Erie Lackawanna Railroad by the Brotherhood of Railroad Trainmen.

(N) That the books and records of the Brotherhood of Railroad Trainmen contain entries which are made and entered at or about the time of the transactions which they reflect.

(O) That an examination of the books and records of the Brotherhood of Railroad Trainmen would show the following to be disbursements of the Erie Lackawanna (East) General Grievance Committee Advance Fund for the months of January 1965 to March 1967 inclusive:

Requests for Admission Under Rule 36
Dated May 23, 1967

	Year 1965	*Year 1966*	*Year 1967*	
January	$ 2,732,08	$ 2,400.68	$ 4,742.88	
February	2,275.03	3,434.83	2,238.15	
March	2,901.12	3,796.90	3,288.05	
April	2,894.55	7,599.89		
May	2,930.87	3,393.46		
June	2,714.53	4,528.49		
July	2,977.80	3,432.82		
August	2,429.87	3,312.10		
September	3,638.07	4,628.27		
October	4,248.55	3,327.99		
November	4,539.09	3,004.45		
December	3,846.02	4,097.47		
	$38,127.58	$46,957.35	$10,269.08	Total (East) $95,354.01

(P) That an examination of the books and records of the Brotherhood of Railroad Trainmen would show the following to be the disbursements of the Erie Lackawanna (West) General Grievance Committee Advance Fund for the months of January 1965 to March 1967 inclusive:

	Year 1965	*Year 1966*	*Year 1967*	
January	$ 4,040.37	$ 2,755.27	$ 3,178.49	
February	5,004.65	3,487.87	3,763.29	
March	9,687.02	6,804.86	13,687.98	
April	15,181.84	3,870.24		
May	4,136.13	3,670.20		
June	6,680.73	4,781.85		
July	4,905.59	2,629.57		
August	4,466.44	7,017.39		
September	6,326.03	6,486.70		
October	4,287.79	5,157.85		
November	3,694.40	5,053.96		
December	7,144.84	6,865.21		
	$75,555.83	$58,580.97	$20,629.76	Total (West) $154,766.56
			Grand Total	$250,120.57

Requests for Admission Under Rule 36
Dated May 23, 1967

Dated: New York, N.Y.
May 23, 1967.

Yours, etc.

ARNOLD B. ELKIND
Attorney for Defendants,
Brotherhood of Railroad
Trainmen and W. J. Weil
122 East 42nd Street
New York, N.Y. 10017

To:

ALAN F. PERL, ESQ.
Sturm and Perl
150 Broadway
New York, N.Y.

LEE LEIBIK
RUTH WEYAND
343 South Dearborn Street
Chicago, Illinois 60604
Attorneys for Plaintiffs
and Intervenor-Plaintiffs

Exhibits Annexed to Requests for Admission

AGREEMENT

Between The

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY (Lines East)

And The

BROTHERHOOD OF RAILROAD TRAINMEN

This agreement, made this 1st day of February, 1967 by and between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the "Company" (Lines East), and the Brotherhood of Railroad Trainmen, hereinafter referred to as the "Brotherhood", witnesseth:

IT IS AGREED:

Section 1.

(a) In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the company now or hereafter subject to the rules and working conditions agreement between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreement, become members of the Brotherhood within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in the Brotherhood; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months.

(b) It is agreed, as a condition of continued employment, all employes of the company shall hold or acquire member-

ship in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East) covering employes of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employe from changing membership from one organization to another organization having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East), covering employes of a craft or class in train or yard service; provided further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood.

Section 2.

(a) Every employe covered by the provisions of this agreement shall be considered by the Company to have met the requirements of this agreement, or as having been denied membership in the Brotherhood, unless the Company is advised to the contrary in writing by the Brotherhood.

(b) Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreement.

Section 3.

Employes promoted to official or other positions who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this agreement; provided, that if such employes shall have terminated membership during their occupancy of official or other positions, they shall, within sixty (60) calendar days following date

of their return to service represented by this Brotherhood, come under the provisions of Section 1 of this agreement.

Section 4.

Employes furloughed through reduction of force, or absent due to sickness or disability, or leave of absence, who retain and/or accumulate seniority under the provisions of the schedule agreement, wlil not have such seniority terminated by reason of any of the provisions of this agreement, but shall, within sixty (60) calendar days following date of their resumption of employment, come under Section 1 of this agreement.

Section 5.

The seniority status and rights of employes furloughed to serve in the Armed Forces shall not be terminated by reason of any of the provisions of this agreement, but shall, within sixty (60) calendar days following resumption of employment, come under Section 1 of this agreement.

Section 6.

An employe, retired on disability annuity under the Railroad Retirement Act at an age earlier than 65 and who retains seniority until he reaches age 65, shall not have his seniority status and rights terminated by reason of noncompliance with the provisions of this agreement. If the employe returns to active service, he shall, within sixty (60) calendar days following date of his return, come under Section 1 of this agreement.

Section 7.

Notice of non-compliance with the provisions of Section 1 of this agreement by an individual employe shall be given

by Certified Mail by the General Chairman (or designated representative) of the Brotherhood to the Vice President-Labor Relations of the Company not earlier than the expiration of the sixty (60) calendar day period from the date of employment in a craft or class of service covered by this agreement or resumption of employment as contemplated by Sections 3, 4, 5 and 6.

Section 8.

(a) Termination of an employe's seniority rights and employment relationship with the Company due to alleged non-compliance with the provisions of Section 1 of this agreement shall not be made without notice. The Brotherhood will notify the highest officer of the Company designated to handle notices under this agreement, by Certified Mail, of any employe who it is alleged has failed to comply with the provisions of Section 1 of this agreement. Upon receipt of such notice, the Company will, within ten calendar days of such receipt, so notify the employe concerned in writing by Certified Mail, or personal delivery, delivery to be evidenced by a receipt. An employe so notified who disputes the fact that he has failed to comply with the terms of this agreement shall, within a period of ten calendar days from the date of receipt of such notice, request the Company in writing by Certified Mail, or personal delivery, delivery to be evidenced by a receipt, to accord him a hearing. Upon receipt of such request the Company shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing with copy to the Brotherhood by Certified Mail, or personal delivery, delivery to be evidenced by a receipt. The receipt by the Company of a request for a hearing shall

operate to stay action on the termination of employment until the hearing is held and the decision of the Company is rendered.

The Company shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the provisions of Section 1 of this agreement and shall render a decision within ten calendar days from the date that the hearing is closed, and the employe and the Brotherhood shall be promptly advised thereof in writing, by Certified Mail, or personal delivery, delivery to be evidenced by a receipt.

In the event the employe concerned does not request a hearing as provided herein, the Company shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the Brotherhood, unless the Company and the Brotherhood agree otherwise in writing.

(b) Discipline rules contained in existing agreements between the Company and the Brotherhood will not apply to cases arising under this agreement.

Section 9.

(a) An employe whose service is terminated for noncompliance with the provisions of this agreement, shall be regarded as having terminated his employment relationship, except such termination will not be required to be effected until such time as a qualified replacement is available; however, his position on the roster will be changed to show him as being the youngest employe on the roster.

(b) An employe whose services are terminated in accordance with the provisions of Section 8 hereof shall not there-

after be restored to the carrier's service in any craft or class represented by the Brotherhood except as a new employe or as provided in Section 11 of this agreement.

Section 10.

Nothing in this agreement shall require an employe to become or to remain a member of the Brotherhood if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. For purposes of this agreement, dues, fees, and assessments, shall be deemed to be "uniformly required" if they are required of all employes in the same status at the same time.

Section 11.

(a) If an employe's seniority and employment under the Rules and Working Conditions Agreement is terminated by the Company under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, unlawful, or unenforceable, the Brotherhood shall indemnify and save harmless the Company against any and all liability arising as the result of such improper, unlawful, or unenforceable termination of seniority and employment; provided, however, that this section shall not apply to any case in which the Company involved is the plaintiff or the moving party in the action in which the aforesaid determination is made or in which case the Company acts in collusion with any em-

ployе; provided further, that the aforementioned liability shall not extend to the expense to the Company in defending suits by employes whose seniority and employment are terminated by the Company under the provisions of this agreement.

(b) An employe whose seniority and employment is terminated because of alleged non-compliance with the provisions of this agreement and such termination of seniority and employment is subsequently determined to be improper, unlawful or unenforceable, the employe shall be returned to service with seniority rights unimpaired.

Section 12.

(a) In the event the decision reached by the Company on the basis of the hearing held in accordance with the provisions of Section 8 hereof is not satisfactory to the employe or to the Brotherhood it may be appealed in writing by Certified Mail, Return Receipt Requested, directly to the highest officer of the Company designated to handle appeals under this agreement. Such appeals must be received by such officer within ten calendar days of the date of the decision appealed from and shall operate to stay action on the termination of seniority and employment, until the decision on appeal is rendered. The Company shall promptly notify the other party in writing of any such appeal by Certified Mail, Return Receipt Requested. The decision on such appeal shall be rendered within ten calendar days of the date the notice is received, and the employe and the Brotherhood shall be promptly advised thereof in writing by Certified Mail, Return Receipt Requested.

(b) If the decision on such appeal is that the employe has not complied with the terms of this agreement, his seniority

and employment under the rules and working conditions agreement shall be terminated within ten calendar days of the date of said decision unless selection of a neutral is requested as provided below, or unless the Company and the Brotherhood agree otherwise in writing. The decision on appeal shall be final and binding unless within ten calendar days from the date of the decision the Brotherhood or the employe involved requests the selection of a neutral person to decide the dispute as provided in Section 12 (c) below. Any request for the selection of a neutral person, as provided in Section 12 (c) below, shall operate to stay action on the termination of seniority and employment until not more than ten calendar days from the date decision is rendered by the neutral person, except, however, in a case where the selection of a neutral is requested by the employe, beginning within ten calendar days of the date of the carrier's decision on appeal, and continuing until decision is rendered by the neutral person, his position on the roster will be changed to show him as being the youngest employe on the roster.

(c) If within ten calendar days after the date of a decision on appeal by the highest officer of the Company designated to handle appeals under this agreement the Brotherhood or the employe involved requests such highest officer in writing by Certified Mail, Return Receipt Requested, that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the Company designated to handle appeals under this agreement or his designated representative, the Chief Executive of the Brotherhood or his designated representative, and the employe involved or his representative. If they are unable to agree upon the

selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The Company, the Brotherhood and the employe involved shall have the right to appear and present evidence at a hearing before such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties. The Company, the employe and the Brotherhood shall be promptly advised thereof in writing by Certified Mail, Return Receipt Requested. If the position of the employe is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the Company and the Brotherhood; if the employe's position is not sustained, such fees, salary and expenses shall be borne in equal shares by the Company, the Brotherhood and the employe.

(d) The time periods specified in this section may be extended in individual cases by written agreement between the Company and the Brotherhood.

(e) In computing the time periods specified in this agreement, the date on which the notice is received or decision rendered shall not be counted.

Section 13.

No part of this agreement shall be used in any manner whatsoever as a basis for a grievance or time claim by or on behalf of any employe; and no part of the schedule agreement covering rates of pay and working conditions shall be used as a basis for a grievance or time claim by or on behalf of any employe predicated upon an alleged violation, misapplication or non-compliance with any part of this agreement.

Exhibits Annexed to Requests for Admission

Section 14.

This agreement is in full and final settlement of the Section 6 notices dated November 16, 1966 and December 14, 1966, served on this carrier by the BRT, and carrier's counterproposals dated November 25, 1966. This agreement, which supersedes the Union Shop Agreement dated June 9, 1953, shall become effective March 1, 1967, and will remain in effect until revised or cancelled in accordance with the provisions of the Railway Labor Act, as amended.

FOR THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY (Lines East):

(Signed) S. W. AMOUR
Vice President-Labor Relations

FOR THE EMPLOYEES

(Signed) E. L. Dirks
General Chairman
Brotherhood of Railroad Trainmen

Exhibits Annexed to Requests for Admission

AGREEMENT

Between The

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY (Lines East)

And The

BROTHERHOOD OF RAILROAD TRAINMEN

It is agreed that in the application of the Union Shop Agreement signed this date in Chicago, Illinois, that any employe in service on the date of this agreement who is not a member of a union as provided in Section 1 of the Union Shop Agreement and who will make affidavit he was a member of a bona fide and recognized religious group, on the date of this agreement, having scruples against joining a union, will, if he would otherwise be required to join a union under the Union Shop Agreement, be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments to one of the unions as specified in Section 1 of the Union Shop Agreement.

Signed at Chicago, Illinois, this 1st day of February, 1967.

FOR THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY (Lines East):

(Signed) S. W. AMOUR
Vice President-Labor Relations

FOR THE EMPLOYES:

(Signed) E. L. DIRKS
General Chairman—BRT

Exhibits Annexed to Requests for Admission

AGREEMENT

Between

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
NEW YORK AND LONG BRANCH RAILROAD COMPANY

and

BROTHERHOOD OF RAILROAD TRAINMEN

Effective March 15, 1967 it is agreed:

1. Subject to the terms and conditions hereinafter set forth, all employes of the Carriers in the general classes of Conductors, Trainmen and Yardmen, (including Switchtenders and Car Retarder Operators) who are represented by the Brotherhood and embraced by the respective agreements between the parties hereto, shall, as a condition of their continued employment in such work, be members of the Brotherhood.

2. Employes shall acquire membership in the Brotherhood within sixty calendar days of the date on which they first perform compensated service in the classes described in Section 1 hereof under the provisions of the respective agreements, or within sixty calendar days of the effective date of this agreement, whichever is later, and shall retain such membership during the time they are employed in such classes or during the time this agreement remains in effect, except as otherwise provided herein.

3. It is agreed as a condition of continued employment, all employes of the Company shall hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act, having a Labor contract with The Central Railroad Company

of New Jersey covering employes of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employes from changing membership from one organization to another organization having a labor contract with The Central Railroad Company of New Jersey covering employes of a craft or class in train or yard service.

4. (a) Employes who retain seniority in these classes and who are regularly assigned or transferred to full time employment not covered by such agreements or who, for a period of thirty days or more, are (1) furloughed on account of force reduction, or (2) on leave or absence, or (3) absent on account of sickness or disability, will not be required to maintain membership as provided in Section 1 of this agreement as long as they remain in such other employment, or furloughed or absent as herein provided, but they may do so at their option. Should such employes return to any service and continue therein thirty calendar days or more, irrespective of the number of days actually worked during that period, they shall, as a condition of their continued employment subject to such agreements be required to become and remain members of the organization representing their class within thirty-five calendar days from date of their return to such service.

(b) The seniority status and rights of employes furloughed to serve in the Armed forces or granted leaves of absence to engage in studies under an educational aid program sponsored by the federal government or a state government for the benefit of ex-service men shall not be terminated by reason of any of the provisions of this agreement but such employes shall, upon resumption of employ-

ment be considered as new employes for the purposes of applying this agreement.

(c) Employes who retain seniority in these classes and who, for reasons other than those specified in subsections (a) and (b) of this section, are not in service covered by such agreements, or leave such service, will not be required to maintain membership as provided in Section 1 of this agreement so long as they are not in service covered by such agreements, but they may do so at their option. Should such employes return to any service covered by the said agreements they shall, as a condition of their continued employment, be required, from the date of return to such service, to become and remain members in the Brotherhood.

5. Nothing in this agreement shall require an employee to become or remain a member of the Brotherhood if such membership is not available to such employee upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employee is denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. The dues, initiation fees, and assessments referred to herein mean indebtedness accruing for these items following the effective date of this agreement.

6. The Brotherhood will keep account of employes in classes described in Section 1, and will independently ascertain the status of such employes under the membership

requirements of this agreement. The Carrier shall furnish to the General Chairmen of the Brotherhood monthly, the names and addresses of all employes who commenced work in the classes described in Section 1 hereof, during the previous month after the effective date of this agreement.

7. (a) The Brotherhood will notify the employing Carrier in writing the identity of any employees who employment under the respective agreements between the parties hereto it requests be terminated by reason of failure to comply with the terms of this agreement. Upon receipt of such notice and request, the Carrier will, as promptly as possible but within ten calendar days of such receipt, notify the employee concerned in writing by registered mail to his last known address, or receipted personal delivery, that he is charged with failure to comply with the terms of this agreement. Copy of such notice shall be given to the Brotherhood. Any employee so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall, within a period of ten calendar days from the date of such notice, request the Carrier in writing to accord him a hearing. Such request shall be honored by the Carrier and date set for hearing as soon as possible, but within ten calendar days of the date of receipt of request therefor. Copy of notice of such hearing shall be given to the Brotherhood. The receipt by the Carrier of a request for a hearing shall operate to stay action on the request of the Brotherhood for termination of employment until the hearing is held and the final decision on the property is rendered. In the event the employee concerned the Carrier and the Brotherhood agree otherwise in writing fails to request a hearing as provided for herein, unless

and except as herein after provided, the Carrier shall proceed to terminate his employment under the applicable agreements between the parties hereto at the end of a period of thirty calendar days from receipt of the request from the Brotherhood.

(b) That in the event the application of this agreement would require the discharge of an employee or of a group of employes which, because of a manpower shortage or because of particular requirement on that job or jobs might make it difficult to fill such position or positions, the Carrier involved shall have a reasonable time within which to prepare for such replacement during which time the employee or employes subject to discharge may continue on in the positions they then occupy but they will not have any right to displace other employes or to bid on any vacancies.

(c) The Carrier shall determine on the basis of evidence produced at the hearing whether or not the employee has complied with the terms of this agreement, and shall render a decision accordingly. Such decision shall be rendered within twenty calendar days of the hearing date and the employee and the Brotherhood shall be promptly advised thereof. If the decision is that the employee has not complied with the terms of this agreement, unless the Carrier and the Brotherhood agree otherwise in writing, his employment in classes described in Section 1 hereof shall, except as provided in paragraph (b) hereof, be terminated within twenty calendar days of the date of said decision. The decision shall be final and binding unless within thirty calendar days thereafter the Carrier is notified in writing that the decision is unsatisfactory and in such event the dispute may be submitted to a tribunal having jurisdiction

thereof within six months of the date of such decision. The accredited representative of the Brotherhood shall have the right to be present at and participate in any hearing conducted pursuant to this agreement.

(d) Discipline rules contained in existing agreements between the Carriers and the Brotherhood will not apply to cases arising under this agreement.

(e) An employee whose employment is terminated as a result of noncompliance with the provisions of this agreement shall be regarded as having terminated his employee relationship for vacation purposes.

8. Neither this agreement, nor any provision contained herein, shall be used as a basis for time or money claims against the Carriers.

9. That the organization will indemnify the Carriers party to this agreement from and against any and all claims or grievances which may arise out of any discharge under this agreement, which may be held to have been illegal or unjust by any competent court or other authority having jurisdiction of such claims.

10. The agreement effective December 1, 1953 is accordingly abrogated.

11. This agreement shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

Exhibits Annexed to Requests for Admission

Signed at Jersey City, New Jersey, this 9th day of March 1967.

For:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY NEW YORK AND LONG BRANCH RAILROAD COMPANY

/s/ J. A. CADDECKE
Vice President

For:

BROTHERHOOD OF RAILROAD TRAINMEN

/s/ E. D. McLAUGHLIN
General Chairman

/s/ STEPHEN F. McDONALD
Secretary

APPROVED:

/s/ W. J. WEIL
Vice President

Exhibits Annexed to Requests for Admission

MEMORANDUM OF AGREEMENT

Between

READING COMPANY

and

BROTHERHOOD OF RAILROAD TRAINMEN

This Agreement made this 15th day of March, 1967, by and between the Reading Company, hereinafter referred to as the Company, and the employes of said Company represented by the Brotherhood of Railroad Trainmen, hereinafter referred to as the Brotherhood.

IT IS AGREED:

Section 1

As a condition of continued employment, and subject to the conditions hereinafter provided, all employees now or hereafter employed in any work covered by the rules and working conditions agreement between the parties hereto, who have established a seniority date under that agreement, shall, within sixty days following the beginning of such employment or the effective date of this agreement, whichever is later, become members of the organization party to this agreement representing their craft or class: Provided, that such condition shall not apply with respect to any employe to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to any employe to whom such membership was denied or terminated for any reason other than the failure of the employe to tender the uniform periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Exhibits Annexed to Requests for Admission

Section 2

It is agreed as a condition of continued employment, all employes of the Company shall hold or acquire membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the Reading Company covering employes of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employe from changing membership from one organization to another organization having a labor contract with the Reading Company covering employes of a craft or class in train or yard service.

Section 3

(a) Each employe covered by the provisions of this agreement shall be considered by the Company to have met the requirements of the agreement unless and until the Company is advised to the contrary in writing by the Brotherhood. The Brotherhood will notify the Company in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, of any employe who it is alleged has failed to comply with the terms of this agreement and who the Brotherhood therefore claims is not entitled to continue in employment subject to the rules and working conditions agreement. The form of notice shall specify the reasons for allegation of noncompliance and be similar to that which is attached to and made a part of this agreement. Upon receipt of such notice, the Company will, within ten calendar days of such receipt, so notify the employe concerned in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. Copy of such notice to the employe shall be given the Brotherhood. An employe so notified who disputes the

fact that he has failed to comply with the terms of this agreement, shall within a period of ten calendar days from the date of receipt of such notice, request the Company in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, to accord him a hearing. Upon receipt of such request the Company shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing with copy to the Brotherhood, by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. A representative of the Brotherhood shall attend and participate in the hearing. The receipt by the Carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the Company is rendered.

In the event the employe concerned does not request a hearing as provided herein, the Company shall proceed to terminate his seniority and employment under the rules and working conditions agreement not later than thirty calendar days from receipt of the above described notice from the organization, unless the Company and the Brotherhood agree otherwise in writing.

(b) The Company shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the terms of this agreement and shall render a decision within twenty calendar days from the date that the hearing is closed, and the employe and the Brotherhood shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested.

Exhibits Annexed to Requests for Admission

If the decision is that the employe has not complied with the terms of this agreement, his seniority and employment under the rules and working conditions agreement shall be terminated within twenty calendar days of the date of said decision except as hereinafter provided or unless the Company and the Brotherhood agree otherwise in writing.

If the decision is not satisfactory to the employe or to the Brotherhood it may be appealed in writing by Registered Mail, Return Receipt Requested, directly to the highest officer of the Company designated to handle appeals under this agreement. Such appeals must be received by such officer within ten calendar days of the date of the decision appealed from and shall operate to stay action on the termination of seniority and employment, until the decision on appeal is rendered. The Company shall promptly notify the other party in writing of any such appeal, by Registered Mail, Return Receipt Requested. The decision on such appeal shall be rendered within twenty calendar days of the date the notice of appeal is received, and the employe and the Brotherhood shall be promptly advised thereof in writing, by Registered Mail, Return Receipt Requested.

If the decision on such appeal is that the employe has not complied with the terms of this agreement, his seniority and employment under the rules and working conditions agreement shall be terminated within twenty calendar days of the date of said decision unless selection of a neutral is requested as provided below, or unless the Company and the Brotherhood agree otherwise in writing. The decision on appeal shall be final and binding unless within ten calendar days from the date of the decision the Brotherhood or the employe involved requests the selection of a neutral

person to decide the dispute as provided in Section 3 (c) below. Any request for selection of a neutral person as provided in Section 3 (c) below shall operate to stay action on the termination of seniority and employment until not more than ten calendar days from the date decision is rendered by the neutral person.

(c) If within ten calendar days after the date of a decision on appeal by the highest officer of the Company designated to handle appeals under this agreement the Brotherhood or the employe involved requests such highest officer in writing by Registered Mail, Return Receipt Requested, that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the Company designated to handle appeals under this agreement or his designated representative, The Chief Executive of the Brotherhood or his designated representative, and the employe involved or his representative. If they are unable to agree upon the selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The Company, the Brotherhood and the employe involved shall have the right to appear and present evidence at the hearing before such neutral arbitrator. Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties. The Company, the employe and the Brotherhood shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested. If the position of the employe is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the Company and the Brotherhood; if the employe's position is not sustained, such fees, salary and ex-

penses shall be borne in equal shares by the Company, the Brotherhood and the employe.

(d) The time periods specified in this section may be extended in individual cases by written agreement between the Company and the Brotherhood.

(e) Provisions of investigation and discipline rules contained in the rules and working conditions agreement between the Company and the Brotherhood will not apply to cases arising under this agreement.

(f) The General Chairman of the Brotherhood shall notify the Company in writing of the title(s) and address(es) of its representatives who are authorized to serve and receive the notices described in this agreement. The Company shall notify the General Chairman of the Brotherhood in writing of the title(s) and address(es) of its representatives who are authorized to receive and serve the notices described in this agreement.

(g) In computing the time periods specified in this agreement, the date on which a notice is received or decision rendered shall not be counted.

Section 4

The provisions of Section 1 of this agreement are not applicable to:

(a) An employee who now occupies or who hereafter is promoted to an official position with the Company for a period of more than thirty calendar days and whose seniority is preserved under the provisions of the rules agreement with the Brotherhood, or

(b) An employe who is off duty account of sickness, disability, furlough or leave of absence for military service

(including leave of absence for educational purposes provided in G.I. Bill of Rights), for a period in excess of thirty calendar days, or

(c) An employe who retires on disability annuity under the Railroad Retirement Act at an age earlier than 65 years and who retains seniority until he reaches the age of 65 years.

Section 5

No part of this agreement shall be used in any manner whatsoever as a basis for a grievance or time claim by or on behalf of any employe; and no part of the schedule agreement covering rates of pay and working conditions shall be used as a basis for a grievance or time claim by or on behalf of any employe predicated upon an alleged violation, misapplication or non-compliance with any part of this agreement relating to Union Shop.

Section 6

In the event that seniority and employment under the rules and working conditions agreement is terminated by the Company under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, unlawful, or unenforceable, the Brotherhood shall indemnify and save harmless the Company against any and all liability arising as the result of such improper, unlawful, or unenforceable termination of seniority and employment; Provided, however, that this section shall not apply to any case in which the Company involved is the plaintiff or the moving party in the action in which the aforesaid determination is made or in which case the Company acts in collusion with any em-

ployе; Provided, further, that the aforementioned liability shall not extend to the expense to the Company in defending suits by employes whose seniority and employment are terminated by the Company under the provisions of this agreement.

Section 7

This Agreement abrogates the Agreement of May 16, 1953.

This Agreement shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

Signed at Philadelphia, Pa., March 15, 1967.

For Brotherhood of Railroad Trainmen

/s/ Leo J. Ward
General Chairman

/s/ M. K. (Illegible)
Vice Chairman

/s/ J. F. (Illegible)
Secretary

Approved:

/s/ W. J. Weil
Vice President

For Reading Company

/s/ V. W. (Illegible)
Manager Labor Relations

Exhibits Annexed to Requests for Admission

AGREEMENT dated August 14, 1962, between CAMBRIA AND INDIANA RAILROAD COMPANY, CONEMAUGH & BLACK LICK RAILROAD COMPANY, PATAPSCO & BACK RIVERS RAILROAD COMPANY, PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY, SOUTH BUFFALO RAILWAY COMPANY, and STEELTON & HIGHSPIRE RAILROAD COMPANY and UNITED STEELWORKERS OF AMERICA.

RULE 3—RECOGNITION AND UNION MEMBERSHIP

(a) Subject to the provisions of the Railway Labor Act, the Company recognizes the Union as the exclusive representative of all the Employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

(b) Subject to the provisions of the Railway Labor Act, all the Employees shall, as a condition of continued employment, become members of the Union within 60 calendar days after the date on which they first perform compensated service in employment covered by these Rules, and shall thereafter maintain membership in the Union in good standing during the time they remain in such employment, except that such membership shall not be required of any Employee until after he has completed 30 days of such compensated service within a period of 12 consecutive calendar months.

(c) Subject to the provisions of the Railway Labor Act, upon receipt by the company of a voluntary written assignment by an Employee (in a form agreed to by the Company and the Union), the Company shall deduct from the pay of such Employee each month thereafter during the existence of such assignment his periodic Union dues for the preced-

ing month, and the Company shall also deduct any assessments against him which shall be general and uniform among the Employees and, if owing by him, an initiation fee uniformly required as a condition of acquiring membership in the Union, all as payable to the Union in accordance with its constitution and by-laws. The International Secretary-Treasurer of the Union shall notify the Company in writing of the respective amounts of dues, initiation fees and assessments which shall be so deducted.

(d) The Union shall indemnify the Company and hold it harmless against any and all suits, claims, demands and liabilities that may arise out of or by reason of any action that shall be taken by the Company for the purpose of complying with the provisions of this Rule 3.

Exhibits Annexed to Requests for Admission

September 21, 1966.

Mr. Stanley Laboski
General Chairman
Brotherhood of Locomotive Engineers
211 14th Street
West Babylon, New York

Dear Mr. Laboski:

Reference is made to Article XVI ("Union Shop") of the basic agreement between us dated May 27, 1964.

It is proposed that this Article be amended by striking out Paragraph A-3 thereof in its entirety.

If you are in accord with the foregoing, would you please indicate your agreement by signing in the space designated below.

Very truly yours,

/s/ Louis J. Gambaccini
LOUIS J. GAMBACCINI
Vice President and General Manager

A.....
FOR
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

/s/ S. W. Laboski
General Chairman

/s/ .....
APPROVED:
Assistant Crane Chief Engineer

Exhibits Annexed to Requests for Admission

PORT AUTHORITY
TRANS-HUDSON
CORPORATION

AGREEMENT

with

Brotherhood of Locomotive Engineers
Effective

MAY 27, 1964

filling any such vacancy shall be paid at the Motormen's rate of pay for the entire day, unless providing only toilet relief. Upon being released from such an assignment, a Motor-Switchman shall return to complete his regular tour of duty.

5. Employees affected hereunder are required to consult the daily assignment sheet.

6. Presently A.M. runs and tours of duty commence between 4:30 A.M. ~~and noon,~~ P.M. runs and tours of duty commence between 12:01 P.M. and 9:59 P.M. and Midnight runs and tours of duty commence between 10:00 P.M. and 4:29 A.M. Prior assignments hereunder shall be filled only by employees whose regular assignments are on the same shift as the vacant job, i.e., A.M. for A.M., P.M. for P.M., and Midnight for Midnight. This provision shall not apply to employees on the preferred extra list or extra list, as such employees do not have regular assignments.

Exhibits Annexed to Requests for Admission

Article XVI

UNION SHOP

A. 1. Subject to the terms and conditions hereinafter set forth, all employees in classes of employment covered by this Agreement shall, as a condition of their continued employment, be members of the Brotherhood.

2. Employees shall acquire membership in the Brotherhood within sixty (60) calendar days of the date on which they first perform compensated service under the provisions of this Agreement, or within sixty (60) calendar days of the effective date of this Article, whichever is later, and shall retain such membership during the time they are so employed during the time this Article remains in effect, except as otherwise provided herein.

3. The requirements of the membership specified in this Article shall be satisfied if employees in classes described in Section 1 hereof shall hold or acquire membership in any one of the labor organizations other than the Brotherhood, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees in classes of employment covered by this Agreement, provided, however, that any employee in such service on the effective date of this Article who is not a member of any such organization may, as a condition of continuing such employment, be required to become a member of the Brotherhood party to this Agreement: provided, further, that nothing herein shall prevent an employee from changing membership from one organization to another organization admitting to membership such employees in classes of employment covered by this Agreement.

Exhibits Annexed to Requests for Admission

4. (a) When employees are regularly assigned to official or subordinate official positions or are regularly transferred to classes of employment not covered by this Agreement they will not be compelled to maintain membership as provided in this Article but may do so at their own option.

(b) Employees furloughed through reduction in force, or employees off due to sickness or leave of absence, etc., for more than thirty (30) continuous days, who retain and/or accumulate seniority, under the provisions of this Agreement, will not have such seniority terminated by reason of any of the provisions of this Article, but shall upon resumption of employment, come under Section 2 of this Article.

5. Nothing in this Article shall require an employee to become or remain a member of the Brotherhood if such membership is not available to such employee upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employee is denied or terminated for any reason other than the failure of the employee to tender the periodic dues, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. The dues, initiation fees, and assessments referred to heren mean indebtedness accruing for these items following the effective date of this Article.

6. The Brotherhood will keep account of employees in classes of employment covered by this Agreement and will independently ascertain the status of such employees under the membership requirements of this Article. PATH shall furnish to the accredited representative of the Brotherhood within ten (10) calendar days from date of employment the

names and addresses of all employees entering the service in classes of employment covered by this Agreement.

THIS AGREEMENT MADE THIS 20TH DAY OF DECEMBER, 1966, BY AND BETWEEN THE RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY AND THE EMPLOYES THEREOF REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

IT IS AGREED:

SECTION 1 — In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the Carrier now or hereafter subject to the rules and Working Conditions Agreement between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the Organization party to this agreement within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement and thereafter shall maintain membership in such Organization, except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future Rules and Working Conditions Agreements.

SECTION 2 — (a) The requirements of membership in the Organization party to this agreement provided for in Section 1 shall be fully applicable to all regularly employed employes in the crafts or classes represented by such Organization but shall be satisfied if any present or future

employee in engine, train, yard or hostling service who is not regularly employed in the crafts or classes represented by such Organization shall hold or acquire membership in any one of the labor organizations other than the Organization signatory herein, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employes of a craft or class in engine, train, yard or hostling service, that is, an employe engaged in any of the services or capacities covered in Sec. 3; First (h) of the Railway Labor Act, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board; provided, however, that nothing contained in this agreement, shall prevent any employe who is not regularly employed in the crafts or classes represented by such organization from changing membership from one organization to another organization admitting to membership employes of a craft or class in any of the services above specified.

(b) For the purposes of this agreement, employes who retain seniority under the Rules and Working Conditions Agreements between the parties hereto and return to and continue in any service covered thereby for thirty calendar days or more, irrespective of the number of days actually worked during the period, shall be considered regular employes in the crafts or classes represented by the Organization party signatory hereto; and their continued employment subject to such agreements shall be conditioned on compliance with the provisions of Section 3 hereof.

(c) The requirements of membership provided for in SECTION 1 shall also be satisfied if any employe subject to the Working Conditions Agreements between the parties hereto, who on the date on which compliance with this

(Union Shop) Agreement is required is not a member of any one of the labor organizations described in the preceeding paragraph and any new employe entering the service of the Richmond, Fredericksburg and Potomac Railroad, subject to the Working Conditions Agreements after the effective date of this agreement, if otherwise required to be a member, pays to the organization periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required of all members of such organization within the time limits provided for in this agreement.

SECTION 3 — (a) Employes who retain seniority under the Rules and Working Conditions Agreements between the parties hereto and who are regularly assigned or transferred to full-time employment not covered by such agreements, or who, for a period of thirty days or more, are (1) furloughed on account of force reduction, or (2) on leave of absence, or (3) absent on account of sickness or disability, will not be required to maintain membership as provided in SECTION 1 of this Agreement so long as they remain in such other employment, or furloughed or absent as herein provided, but they may do so at their option. Should such employes return to any service covered by the said Rules and Working Conditions Agreements and continue therein thirty calendar days or more, irrespective of the number of days actually worked during that period, they shall, as a condition of their continued employment subject to such agreements, be required within thirty-five calendar days from date of their return to such service to comply with the provisions of SECTION 1 or 2 of this agreement.

(b) The seniority status and rights of employes furloughed to service in the Armed Forces or granted leaves of absence to engage in studies under an educational aid

program sponsored by the federal government or a state government for the benefit of ex-service men shall not be terminated by reason of any of the provisions of this agreement but such employes, shall, upon resumption of employment, be considered as new employes for the purposes of applying this agreement.

(c) Employes who retain seniority under the Rules and Working Conditions Agreements between the parties hereto and who, for reasons other than those specified in *subsections (a) and (b) of this section, are not in service* covered by such agreements, or leave such service, will not be required to maintain membership as provided in SECTION 1 of this agreement so long as they are not in service covered by such agreements, but they may do so at their option. Should such employes return to any service covered by the said Rules and Working Conditions Agreements, they shall as a condition of their continued employment, be required, from the date of return to such service, to become and remain members in the Organization signatory hereto, subject to exceptions provided in SECTION 2.

SECTION 4 — Nothing in this agreement shall require an employe to become or to remain a member of the Organization signatory hereto if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. For purposes of this agreement, dues, fees, and assessments shall be deemed to be "uniformly required" if they are required of all em-

ployes in the same status at the same time in the same organizational unit.

SECTION 5 — (a) Each employe covered by the provisions of this agreement shall be considered by the Carrier to have met the requirements of the agreement unless and until the Carrier is advised to the contrary in writing by the Organization. The Organization will notify the Carrier in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, of any employe who it is alleged has failed to comply with the terms of this agreement and who the Organization therefore claims is not entitled to continue in employment subject to the Rules and Working Conditions Agreements. The form of notice to be used shall be agreed upon by the railroad and the Organization and the form shall make provisions for specifying the reasons for the allegation of non-compliance. Upon receipt of such notice, the Carrier will, within ten calendar days of such receipt, so notify the employe concerned in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. Copy of such notice to the employe shall be given the Organization. An employe so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall within a period of ten calendar days from the date of receipt of such notice, request the Carrier in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, to accord him a hearing. Upon receipt of such request the Carrier shall set a date for hearing which shall be held within ten calendar days of the dates of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing with copy to the Organization, by Regis-

tered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. A representative of the Organization shall attend and participate in the hearing. A transcript of the proceedings of such hearing shall be made, and a copy shall be furnished to the Local or General Chairman on request. The receipt by the Carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the Carrier is rendered.

In the event the employe concerned does not request a hearing as provided herein, the Carrier shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreements not later than thirty calendar days from receipt of the above described notice from the Organization, unless the Carrier and the Organization agree otherwise in writing.

(b) The Carrier shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the terms of this agreement and shall render a decision within twenty calendar days from the date that the hearing is closed, and the employe and the Organization shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested.

If the decision is that the employe has not complied with the terms of this agreement, his seniority and employment under the Rules and Working Conditions Agreements shall be terminated within twenty calendar days of the date of said decision except as hereinafter provided or unless the Carrier and the Organization agree otherwise in writing.

If the decision is not satisfactory to the employe or to the Organization it may be appealed in writing, by Registered Mail, Return Receipt Requested, directly to the highest

officer of the Carrier designated to handle appeals under this Agreement. Such appeals must be received by such officer within ten calendar days of the date of the decision appealed from and shall operate to stay action on the termination of seniority and employment, until the decision on appeal is rendered. The Carrier shall promptly notify the other party in writing of any such appeal, by Registered Mail, Return Receipt Requested. The decision on such appeal shall be rendered within twenty calendar days of the date the notice of appeal is received, and the employe and the Organization shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested.

If the decision on such appeal is that the employe has not complied with the terms of this agreement, his seniority and employment under the Rules and Working Conditions Agreements shall be terminated within twenty calendar days of said decision unless selection of a neutral is requested as provided below, or unless the Carrier and the Organization agree otherwise in writing. The decision on appeal shall be final and binding unless within ten calendar days from the date of the decision the Organization or the employe involved requests the selection of a neutral person to decide the dispute as provided in SECTION 5(c) below. Any request for selection of a neutral person as provided in SECTION 5(c) below shall operate to stay action on the termination of seniority and employment until not more than ten calendar days from the date decision is rendered by the neutral person.

(c) If within ten calendar days after the date of a decision on appeal by the highest officer of the Carrier designated to handle appeals under this agreement the Organization or the employe involved requests such highest officer in writing by Registered Mail, Return Receipt Requested,

that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the Carrier designated to handle appeals under this agreement or his designated representative, the Chief Executive of the Organization or his designated representative, and the employe involved or his representative. If they are unable to agree upon the selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The Carrier, the Organization and the employe involved shall have the right to appear and present evidence at a hearing before such neutral arbitrator. Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties. The Carrier, the employe and the Organization shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested. If the position of the employe is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the Carrier and the Organization; if the employe's position is not sustained, such fees, salary and expenses shall be borne in equal shares by the Carrier, the Organization and the employe.

(d) The time periods specified in this section may be extended in individual cases by written agreement between the Carrier and the Organization.

(e) Provisions of investigation and discipline rules contained in the Rules and Working Conditons Agreements between the Carrier and the Organization will not apply to cases arising under this agreement.

(f) The General Chairman of the Organization shall notify the Carrier in writing of the title(s) and address(es) of its representatives who are authorized to serve and receive the notices described in this agreement. The Carrier shall notify the General Chairman of the Organization in writing of the title(s) and address(es) of its representatives who are authorized to receive and serve the notices described in this agreement.

(g) In computing the time periods specified in this agreement, the date on which a notice is received or decision rendered shall not be counted.

SECTION 6 — Other provisions of this agreement to the contrary notwithstanding, the Carrier shall not be required to terminate the employment of an employee until such time as a qualified replacement is available. The Carrier may not, however, retain such employe in service under the provisions of this section for a period in excess of sixty calendar days from the date of the last decision rendered under the provisions of Section 5, or ninety calendar days from date of receipt of notice from the Organization in cases where the employe does not request a hearing. The above periods may be extended by agreement between the Carrier and the Organization signatory hereto.

SECTION 7 — An employe whose seniority and employment under the Rules and Working Conditions Agreements is terminated pursuant to the provisions of this agreement or whose employment is extended under SECTION 6 shall have no time or money claims by reason thereof.

If the final determination under SECTION 5 of this agreement is that an employe's seniority and employment shall be terminated, no liability against the Carrier in favor of the Organization or other employes based upon an alleged

violation, misapplication or non-compliance with any part of this agreement shall arise or accrue during the period up to the expiration of the 60 or 90 days periods specified in SECTION 6, or while such determination may be stayed by a court, or while a discharged employe may be restored to service pursuant to judicial determination. During such periods, no provision of any other agreement between the parties hereto shall be used as the basis for a grievance or time or money claim or on behalf of any employe against the Carrier predicated upon any action taken by the Carrier in applying or complying with this agreement or upon an alleged violation, misapplication or non-compliance with any provisions of this agreement. If the final determination under SECTION 5 of this agreement is that an employe's employment and seniority shall not be terminated, his continuance in service shall give rise to no liability against the Carrier in favor of the Organization or other employes based upon an alleged violation, misapplication or non-compliance with any part of this agreement.

SECTION 8 — In the event that seniority and employment under the Rules and Working Conditions Agreement is terminated by the Carrier under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, unlawful, or unenforceable, the Organization shall indemnify and save harmless the Carrier against any and all liability arising as the result of such improper, unlawful, or unenforceable termination of seniority and employment; provided, however, that this section shall not apply to any case in which the Carrier is the plaintiff or the moving party in the action in which the aforesaid determination is made or in which case the Carrier acts in collusion with

an employe; provided, further, that the aforementioned liability shall not extend to the expense to the Carrier in defending suits by employes whose seniority and employment are terminated by the Carrier under the provisions of this agreement.

SECTION 9 — This Agreement shall become effective January 1, 1967, and shall remain in effect until modified or changed in accordance with the provisions of the Railway Labor Act, as amended.

Signed at Richmond, Virginia, this 20th day of December, 1966.

For:

RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD COMPANY

/s/ T. B. Choate
Director of Personnel

For:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

/s/ W. F. Kidd
General Chairman

Approved:

/s/ R. B. Curtis
Assistant Grand Chief Engineer

Exhibits Annexed to Requests for Admission

RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD COMPANY
Broad Street Station
Richmond, Va. 23220

T. B. Choate,
Director of Personnel

W. H. Walters,
Staff Assistant

December 20, 1966

Mr. W. F. Kidd, General Chairman
Brotherhood of Locomotive Engineers
No. 6 Brook Drive, Mayfield Farms
Ellerson, Virginia

Dear Sir:

In discussing the proposed Engineers' Union Shop Agreement in conference on December 20, 1966, it developed that some employes who would be covered thereby have been ousted from the Organization for nonpayment of dues, etc. Some of these employees who owe back dues will have to comply with the Engineers' Union Shop Agreement signed December 20, 1966, and it was understood and agreed that membership in the Organization will be extended to these employes under the same terms and conditions as are generally applicable to employes who have not previously been members thereof and these employes will not be required to pay back dues as a condition of being accepted to membership in the Brotherhood of Locomotive Engineers.

Exhibits Annexed to Requests for Admission

It was further understood and agreed that the Organization will not cite any employe for non-compliance with the Union Shop Agreement dated December 20, 1966 where such membership has been declined by the Organization because of the employe's failure or refusal to pay any sum allegedly owed the Organization incurred prior to March 1, 1967, including but not limited to dues, fees, assessments, fines or penalties.

Yours very truly,

/s/ T. B. Choate
Director of Personnel

AGREED:

/s/ W. F. Kidd
General Chairman, Brotherhood of
Locomotive Engineers

APPROVED:

/s/ R. B. Curtis
Assistant Grand Chief Engineer

Exhibits Annexed to Requests for Admission

DECISION C&T-75 REVISED

MEMORANDUM OF AGREEMENT BETWEEN BOSTON AND MAINE CORPORATION AND ITS EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF RAILROAD TRAINMEN

This Agreement made this thirteenth day of July, 1966, by and between the Boston and Maine Corporation, hereinafter referred to as the Company, and the employees of said company represented by the Brotherhood of Railroad Trainmen, hereinafter referred to as the Brotherhood:

WITNESSETH:

1. It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all employees within the classes or crafts represented by the Brotherhood shall become and remain members of the said Brotherhood: Provided, That this Agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood.

2. Every employee shall be considered by the Company to be either a member of the Brotherhood as provided for

herein, or as having been denied membership in the Brotherhood, unless the Company is advised to the contrary in writing by the Brotherhood. The Brotherhood shall be responsible for initiating action to enforce the terms of this Agreement.

3. Employees promoted to official or other positions who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this Agreement; Provided, that if such employee shall have terminated membership during their official capacity, they shall, when returning to service represented by this Brotherhood, come under the provisions of Item 1 of this Agreement.

4. Employees furloughed through reduction in force, sickness or leave of absence, etc., who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this Agreement, but shall, upon resumption of employment, come under Item 1 of this Agreement.

5. The seniority status and rights of employees furloughed to serve in the Armed Forces shall not be terminated by reason of any of the provisions of this Agreement but shall, upon resumption of employment, come under Item 1 of this Agreement.

6. An employee retired on disability annuity under the Railroad Retirement Act at an age earlier than 65 and who retains seniority until he reaches the age of 65, shall

not have his seniority status and rights terminated by reason of non-compliance with the provisions of this Agreement. If employee returns to active service, he shall come under Item 1 of this Agreement.

7. Notice of non-compliance with the provisions of this Agreement of an individual employee coming under Item 1 of this Agreement shall be given in writing by the General Chairman (or his designated representative) of the Brotherhood to the Director Labor Relations and Personnel of the Company not earlier than the expiration of the sixty calendar day period from the date of employment. If after hearing, as provided for in Item 8 hereof, it is determined that the seniority of such employee is to be terminated by reason of non-compliance with the provisions of this Agreement, such termination will not be required to be effected until such time as a qualified replacement is available.

8. (a) Release of any employee from the service of the Company and/or the termination of seniority rights and employment relationship because of non-compliance with the provisions of this Agreement shall not be made without notice. Hearing will be granted if the employee requests it in writing; such hearing will be held within ten days from date of receipt of notice and hearing will be confined to proof of compliance. A decision shall be rendered within five days from date of hearing. Employee's service status will not be affected by reason of provisions of this Agreement.

(b) Discipline rules contained in existing agreements between the Company and the Brotherhood will not apply to cases arising under this Agreement.

9. Employees whose services are terminated for non-compliance with the provisions of this Agreement shall be regarded as having terminated their employee relationship.

10. An employee dropped from the service, as provided for in Item 8 hereof, account of non-compliance with the provisions of this Agreement shall not thereafter be restored to the service except as a new employee, or except as provided for in Item 11 hereof.

11. If an employee is released from the service for non-compliance with the provisions of this Agreement and such release is subsequently determined to be improper, unlawful or unenforceable, the employee shall be returned to service without impairment of seniority rights. In the event an employee brings an action for allegedly wrong discharge, the Brotherhood and the Company shall share equally any liability imposed in favor of such employee.

12. (a) For the sole purpose of handling and disposing of disputes arising under this Agreement, a Special Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of two members, one to be appointed by the Company and one by the Brotherhood.

(b) After hearing is granted under Item 8 hereof, an employee who is notified that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall be given a hearing if he submits a request in writing to the Company's Director Labor Relations and Personnel within a period of five (5) calendar days from the date of receipt

of decision rendered under Item 8. The Employee will be notified in writing of the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employee's compliance with the provisions of this Agreement. The employee will be required at this hearing to furnish proof of his compliance with the provisions of this Agreement.

(c) The decision of the Special Board of Adjustment shall be by majority vote and shall be final and binding.

(d) In the event the Special Board of Adjustment is unable to reach a decision, the matter will be submitted to a neutral arbitrator to be selected by the parties or the National Mediation Board, whose decision as to whether or not the employee has complied with the provisions of this agreement shall be final and binding.

(e) Receipt by the Company's Director Labor Relations and Personnel of notice from an employee that he wishes to dispute the charge that he has failed to comply with the membership requirements of this agreement shall operate to stay action on the termination of his seniority and employment pending final decision and for a period of ten (10) calendar days thereafter.

13. No part of this Agreement shall be used in any manner whatsoever as a basis for a grievance or time claim by or on behalf of any employee; and no part of the schedule agreement covering rates of pay and working conditions shall be used as a basis for a grievance or time claim by or on behalf of any employee predicated upon an alleged violation, misapplication or non-compliance with any part of this Agreement relating to Union Shop.

Exhibits Annexed to Requests for Admission

14. This Agreement is in full, final and complete settlement of the dispute growing out of the request contained in the notice served on the Boston and Maine Corporation on May 26, 1966, by the Brotherhood of Railroad Trainmen. This agreement shall become effective July 15, 1966, and shall remain in effect until revised or cancelled in accordance with the provisions of the Railway Labor Act, as amended. Decision C&T-75 is hereby cancelled.

For the Employees Represented By the
Brotherhood of Railroad Trainmen

/s/ J. L. Scanlan
J. L. SCANLAN
General Chairman

For the Boston and Maine
Corporation

/s/ W. J. Ahearne
W. J. AHEARNE
Director Labor Relations and
Personnel

APPROVED:

/s/ W. J. Weil
W. J. WEIL
Vice President

Boston, Massachusetts, July 13, 1966.

Exhibits Annexed to Requests for Admission

NATIONAL MEDIATION BOARD
WASHINGTON

CASE NO. R-2851
CERTIFICATION
June 23, 1954

In the matter of
REPRESENTATION OF EMPLOYEES
of the
CONEMAUGH & BLACK LICK RAILROAD COMPANY
Locomotive Engineers

The services of the National Mediation Board were invoked by the Brotherhood of Locomotive Firemen and Enginemen to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Locomotive Engineers, employees of the Conemaugh & Black Lick Railroad Company.

At the time application was received these employees were represented by the United Steelworkers of America, CIO.

The Board assigned Mediator C. Robert Roadley to investigate and after finding that a dispute existed among the employees concerned, directed him to conduct an election by secret ballot to determine their choice, using an agreed to eligible list.

Exhibits Annexed to Requests for Admission

Following is the result of the election as reported by Mediator Thomas A. Tracy, who was assigned to count the ballots in this case, and attested on June 18, 1954, by representatives of the contesting organizations who acted as observers.

Number of employees voting:

	United Steelworkers of America, CIO	*Brotherhood of Locomotive Firemen & Enginemen*	*Void Ballots*	*Number of Employees Eligible*
Locomotive Engineers	33	32	1	68

FINDINGS AND CERTIFICATION

The National Mediation Board, upon the whole record, including the reports of the Mediators, finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein and that the interested parties were given due notice of investigation, whereupon the National Mediation Board certifies that:

The United Steelworkers of America, CIO, has been duly designated and authorized to continue to represent for purposes of the Railway Labor Act, the craft or class of Locomotive Engineers, employees of the Conemaugh & Black Lick Railroad Company, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

E. C. Thompson, Sec'y.

Exhibits Annexed to Requests for Admission

NATIONAL MEDIATION BOARD
WASHINGTON

CASE NO. R-1904
CERTIFICATION
October 1, 1947

In the matter of
REPRESENTATION OF EMPLOYEES
of the
CONEMAUGH & BLACK LICK RAILROAD COMPANY
Locomotive Engineers

The services of the National Mediation Board were invoked by the United Steelworkers of America, CIO, to investigate and determine who may represent locomotive engineers, employed by the Conemaugh & Black Lick Railroad Company, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employees were represented by the Brotherhood of Locomotive Firemen and Enginemen.

The Board assigned Mr. Lawrence Farmer, Mediator, to investigate, and after finding that a dispute existed among the employees concerned, directed him to conduct an election by secret ballot to determine their choice, using an eligible list agreed to by representatives of the contesting organizations.

Exhibits Annexed to Requests for Admission

Following is the result of the election as reported by the mediator and attested to on September 26, 1947, by representatives of the contesting organizations who acted as observers.

Number of employees voting:

	For United Steelworkers of America, CIO	*For Brotherhood Locomotive Firemen & Enginemen*	*Number Employees Eligible to Vote*
Locomotive Engineers	60	46	106

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that the United Steelworkers of America, CIO, has been duly designated and authorized to represent the craft or class of locomotive engineers, employed by the Conemaugh & Black Lick Railroad Company, for purposes of the Railway Labor Act.

By order of the NATIONAL MEDIATION BOARD.

Robert F. Cole
Secretary

Exhibits Annexed to Requests for Admission

NATIONAL MEDIATION BOARD
WASHINGTON

James W. Carmalt, Chairman
Otto S. Beyer
William M. Leiserson

George A. Cook, Secretary

CASE NO. R-236
CERTIFICATION
April 23, 1937

In the matter of
REPRESENTATION OF EMPLOYEES
of the
CONEMAUGH AND BLACK LICK RAILROAD
Train, Engine and Yard Service Employees

The services of the National Mediation Board were invoked by the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen to settle a dispute as to who may properly represent conductors, brakemen and switchtenders, locomotive engineers, firemen, hostlers and engine inspectors, employed by the Conemaugh and Black Lick Railroad, as provided by Section 2, Ninth, of the Railway Labor Act, amended.

This case was first investigated by Mediator Wm. F. Mitchell, Jr., and later by Mediator P. D. Harvey.

The Mediators conferred with representatives of the carrier and the employees, and were furnished by the employee

representatives with original authorizations signed by employees designating the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen as their duly designated representatives for the purposes of the Railway Labor Act.

The carrier denied the existence of a dispute among the employees, claiming that it deals with and will continue to deal with any representative designated by any individual employee or groups of employees. It, therefore, refused the Mediator access to the payroll records. The employees, however, insisted upon a certification from this Board in keeping with the provisions of the Railway Labor Act.

The Mediators' investigation developed that some, but not all, of the employees desired representation by the above-named organizations, and that a representation plan is maintained on the property under which elections were recently held and representatives chosen to represent the same class of employees whom the employees named above claim they have been designated to represent by a majority.

In view of these differences as to who are the proper representatives, and in view of the provisions of Section 2, Fourth, of the Railway Labor Act that "the majority of any craft or class shall have the rights to determine who shall be the representative of the craft or class for the purposes of this Act", the Board found that a representation dispute, within the meaning of Section 2, Ninth, of the Act, existed among the employees and instructed Mediator Harvey to proceed with the investigation accordingly.

Being unable to secure access to the payroll records of the carrier the Board was unable to take a secret ballot, and therefore utilized another appropriate method of ascertain-

ing the names of the duly designated and authorized representatives of the employees in such manner as to insure the choice of representatives of the employees without interference, influence or coercion exercised by the carrier.

The monthly report of employees, service and compensation made by the carrier to the Interstate Commerce Commission for the month of January 1937 shows the number of employees working in train and yard service during that month was 157; that is, conductors, brakemen, yard foremen, yard helpers and switchtenders. The Mediator's report showed that there were approximately 158 employees as above on the seniority roster at the time of the investigation who were eligible to participate in the election of representatives for these employees. 121 of these employees signed authorizations designating and authorizing the Brotherhood of Railroad Trainmen as their representative.

The report of employees and compensation made by the carrier to the Interstate Commerce Commission for the month of January 1937 shows the number of employees that worked in engine service was 162. The report of investigation made by Mediator Harvey shows that there were approximately 166 employees in this class on the seniority roster at the time of his investigation eligible to participate in the selection of representatives for the purposes of the Railway Labor Act. 116 of these employees signed authorizations designating and authorizing the Brotherhood of Locomotive Firemen and Enginemen as their representative.

By personal interview with the employees in engine service the mediator checked the authorizations of 108 which had designated the Brotherhood of Locomotive Firemen and Enginemen as their representative. These were deter-

mined to be true and authenticated signatures of employees of the carrier. It was not possible to check the remaining signatures to the authorizations, but this was not necessary, as the 108 proved authorizations constituted a clear majority of the total of engine service employees who were eligible to participate in the choice of representatives, and these showed that a majority of the engineers and a majority of the firemen, hostlers and engine inspectors each chose the Brotherhood of Locomotive Firemen and Enginemen.

Of the conductors, brakemen, yard foremen, yard helpers and switchtenders the mediator authenticated 117 signatures of employees designating the Brotherhood of Railroad Trainmen as the representative of these employees, and these showed that a majority of the conductors and brakemen and a majority of the yard foremen, yard helpers and switchtenders each chose this organization.

On the basis of the investigation the National Mediation Board hereby certifies that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent conductors, brakemen, yard foremen, yard helpers and switchtenders, and that the Brotherhood of Locomotive Firemen and Enginemen has been duly designated and authorized to represent locomotive engineers, firemen, hostlers and engine inspectors, employees of the Conemaugh and Black Lick Railroad for the purposes of the Railway Labor Act.

By order of the NATIONAL MEDIATION BOARD.

George A. Cook,
Secretary.

Exhibits Annexed to Requests for Admission

NATIONAL MEDIATION BOARD
WASHINGTON

CASE NO. R-1240
CERTIFICATION
May 16, 1944

In the matter of
REPRESENTATION OF EMPLOYEES
of the
CONEMAUGH & BLACK LICK RAILROAD COMPANY
(1) Locomotive Engineers, (2) Locomotive Firemen, Hostlers and Hostler Helpers and (3) Yardmen (Foremen, Helpers and Switchtenders)

The services of the National Mediation Board were invoked by the United Steelworkers of America, C.I.O., to investigate and determine who may represent (1) locomotive engineers, (2) locomotive firemen, hostlers, and hostler helpers, and (3) yardmen (foremen and helpers), employed by the Conemaugh and Black Lick Railroad Company, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received the locomotive engineers and locomotive firemen, hostlers and hostler helpers were represented by the Brotherhood of Locomotive Firemen and Enginemen, and the yardmen (foremen, helpers and switchtenders) were represented by the Brotherhood of Railroad Trainmen.

Exhibits Annexed to Requests for Admission

The Board assigned Mr. Cornelius E. Hurley, Mediator, to conduct investigation, and after finding that a dispute existed among the employees concerned, directed him to take a secret ballot to determine their choice. Representatives of the contesting organizations agreed to an eligible list, which included switchtenders in the craft or class of yardmen.

Following is the result of the election as reported by the mediator and attested to by the representatives of the contesting organizations who acted as observers:

Number of employees voting for contesting organizations:

	For United Steelworkers of America, C.I.O.	*For Brotherhood of Locomotive Firemen and Enginemen*	*For Brotherhood of Railroad Trainmen*	*Void ballots*	*Number of employees eligible to vote*
Locomotive Engineers	34	47		0	82
Locomotive Firemen, Hostlers and Hostler Helpers	54	45		0	101
Yardmen (Foremen, Helpers and Switchtenders)	90		83	2	182

On the basis of the investigation and report of election the National Mediation Board hereby certifies that the United Steelworkers of America, C.I.O., has been duly designated and authorized to represent the crafts or classes of

locomotive firemen, hostlers and hostler helpers, and yardmen (foremen, helpers and switchtenders), employed by the Conemaugh and Black Lick Railroad Company, for the purposes of the Railway Labor Act.

The Board further certifies that no change in representation is desired by the craft or class of locomotive engineers, employed by the Conemaugh and Black Lick Railroad Company.

By order of the NATIONAL MEDIATION BOARD.

/s/ THOMAS E. BICKERS
THOMAS E. BICKERS
Secretary

(R. 427-446)

Requests for Admission Under Rule 36
Dated June 6, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

Defendant, Brotherhood of Railroad Trainmen, requests the plaintiffs, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents exhibited with this request is genuine:

A. Certification of the National Mediation Board, dated March 1, 1950, designating the Brotherhood of Railroad Trainmen to represent for purposes of the Railway Labor Act, the road conductors, employees of the Delaware, Lackawanna and Western Railroad Company, its successors and assigns.

B. Certification of the National Mediation Board, dated December 29, 1951, designating and authorizing the Brotherhood of Railroad Trainmen to continue to represent for purposes of the Railway Labor Act the craft or class of road conductors, employees of the Erie Railroad Company, its successors and assigns.

Requests for Admission Under Rule 36
Dated June 6, 1967

C. Certification of the National Mediation Board, dated May 7, 1965, authorizing the Brotherhood of Railroad Trainmen to continue to represent, for the purposes of the Railway Labor Act, the craft or class of Switchmen (Yardmen), employees of the Erie Lackawanna Railroad Company, its successors and assigns.

D. Findings of Fact and Conclusions of Law of Hon. Julius J. Hoffman, dated May 24, 1967, in the case of W. L. Birkholz, et al, Plaintiffs, v. Elmer L. Dirks, et al., brought in the United States District Court for the Northern District of Illinois, Eastern Division, No. 67 C 285.

E. Judgment Order signed by Hon. Julius J. Hoffman, United States District Judge, on May 24, 1967, in the case of W. L. Birkholz, et al., Plaintiffs, v. Elmer L. Dirks, et al., Defendants, brought in the United States District Court for the Northern District of Illinois, Eastern Division, No. 67 C 285.

Dated: New York, N.Y.
June 6, 1967.

Requests for Admission Under Rule 36
Dated June 6, 1967

Yours, etc.

ARNOLD B. ELKIND
Attorney for Defendants,
Brotherhood of Railroad
Trainmen and W. J. Weil
122 East 42nd Street
New York, N.Y. 10017

To:

ALAN P. PERL, ESQ.
Sturm and Perl
150 Broadway
New York, N.Y.
LEE LEIBIK
RUTH WEYAND
343 South Dearborn Street
Chicago, Illinois 60604
Attorneys for Plaintiffs
and Intervenor-Plaintiffs

Exhibits Annexed to Requests for Admission

[STAMP]

NATIONAL MEDIATION BOARD
WASHINGTON

CASE No. R-2234

Certification

March 1, 1950

In the matter of

REPRESENTATION OF EMPLOYEES

of

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

Road Conductors

The services of the National Mediation Board were invoked by the Order of Railway Conductors of America to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the road conductors, employees of the Delaware, Lackawanna and Western Railroad Company.

At the time application was received these employees were represented by the Brotherhood of Railroad Trainmen, under certification issued by the Board on January 14, 1947, in Case No. R-1679.

The Board assigned Mediator Clarence G. Eddy to investigate, and after finding that a dispute existed among

the employees concerned, directed him to conduct an election by secret ballot to determine their choice, using an eligible list agreed to by the contesting organizations.

Following is the result of the election as reported by the mediator and attested on February 20, 1950, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

	Brotherhood of Railroad Trainmen	*Order of Railway Conductors of America*	*Void Ballots*	*Number Employees Eligible*
Road Conductors	137	99	1	243

FINDINGS AND CERTIFICATION

The National Mediation Board, upon the whole record and the report of the mediator, finds that the carrier and the employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation; whereupon the National Mediation Board hereby certifies that:

The Brotherhood of Railroad Trainmen has been duly designated and authorized to continue to represent for purposes of the Railway Labor Act, the road conductors, employees of the Delaware, Lackawanna and Western Railroad Company, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

/s/ THOMAS E. BICKERS
Thomas E. Bickers
Secretary

Exhibits Annexed to Requests for Admission

[STAMP]

NATIONAL MEDIATION BOARD
WASHINGTON

CASE No. R-2457

Certification

December 29, 1951

In the matter of

REPRESENTATION OF EMPLOYEES

of the

ERIE RAILROAD COMPANY

Road Conductors

The services of the National Mediation Board were invoked by the Order of Railway Conductors of America to investigate and determine who may represent for purpose of the Railway Labor Act as provided by Section 2, Ninth thereof, the craft or class of road conductors, employees of the Erie Railroad Company.

At the time application was received, these employees were represented by the Brotherhood of Railroad Trainmen.

The Board assigned Mediator Thomas A. Tracy to investigate and after finding that a dispute existed among the employees concerned, directed him to conduct an election by secret ballot to determine their choice, using an eligible list agreed to by the contesting organizations.

Exhibits Annexed to Requests for Admission

Following is the result of the election as reported by the mediator and attested on December 17, 1951, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

	Brotherhood of Railroad Trainmen	*Order of Railway Conductors of America*	*Number Employees Eligible*
Road conductors	259	197	466

FINDINGS AND CERTIFICATION

The National Mediation Board, upon the whole record and the report of the mediator, finds that the carrier and the employees in this case are respectively a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein and that the interested parties were given due notice of investigation whereupon the National Mediation Board certifies that:

The Brotherhood of Railroad Trainmen has been duly designated and authorized to continue to represent for purposes of the Railway Labor Act the craft or class of road conductors, employees of the Erie Railroad Company, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

E. C. THOMPSON
Secretary

Exhibits Annexed to Requests for Admission

NATIONAL MEDIATION BOARD
Washington, D. C. 20572

CASE No. R-3699

CERTIFICATION

May 7, 1965

In the Matter of

REPRESENTATION OF EMPLOYEES

of the

ERIE LACKAWANNA RAILROAD COMPANY

Switchmen (Yardmen)

The services of the National Mediation Board were invoked by the Switchmen's Union of North America, to investigate and determine who may represent, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Switchmen (Yardmen), employees of the Erie Lackawanna Railroad Company.

At the time the application was received these employees were represented by the Brotherhood of Railroad Trainmen.

The Board assigned Mediator Eugene C. Frank to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the employees concerned, and by direction of the Board, the

mediator was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by the mediator above, and attested thereon by the party observers.

Number of Employees Voting:

	Switchmen's Union of North America	*Brotherhood of Railroad Trainmen*	*Void Ballots*	*Number Employees Eligible*
Switchmen (Yardmen)	950	993	7	2,022

The National Mediation Board further finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation.

CERTIFICATION

Therefore, the National Mediation Board certifies that the Brotherhood of Railroad Trainmen has been duly authorized to continue to represent, for the purposes of the Railway Labor Act, the craft or class of Switchmen (Yardmen), employees of the Erie Lackawanna Railroad Company, its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

Sgd. THOMAS A. TRACY
Executive Secretary

(R. 447-459)

Notice of Motion for Summary Judgment by Plaintiffs and Intervenor Plaintiffs

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 Civ. 1264

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ALAN F. PERL, sworn to the 7th day of June, 1967, and upon all of the pleadings and proceedings heretofore had and filed herein, the undersigned will move this Court at a Motion Part thereof, to be held at Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 20th day of June, 1967 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order granting summary judgment herein in favor of the plaintiffs and the interyenor-plaintiffs declaring that a certain agreement entered into on March 14, 1967 and April 4, 1967 between the defendant Erie Lackawanna Railroad Company and the defendant Brotherhood of Railroad Trainmen, which agreement is the subject of this lawsuit, be declared invalid and in violation of Section 2, Fifth and Eleventh (c) of the Railway Labor Act; and for a further order granting judgment in favor of the plaintiff Switchmen's Union of North America and in favor of the plaintiff John P. O'Connell and against the defendant Brotherhood of Railroad Trainmen dismissing the counterclaim of the defendant Brotherhood of Railroad Trainmen, and for such other and further relief as the Court may

deem just and proper including costs and disbursements of this action.

PLEASE TAKE FURTHER NOTICE that opposing papers, if any, are to be served upon counsel for the moving party no later than three (3) days prior to the return date of this motion.

Dated: New York, June 7, 1967

Yours etc.

STURM AND PERL
ALAN F. PERL
150 Broadway
New York City 10038

and

LEE LEIBIK
RUTH WEYAND
343 South Dearborn Street
Chicago, Illinois 60604
Attorneys for Plaintiffs and Intervenor-Plaintiffs

To:

ARNOLD B. ELKIND, Esq.
Attorney for Defendants Brotherhood of Railroad Trainmen and W. J. Weil
122 East 42nd Street
New York City 10017

RAYMOND H. BRANDA, Esq.
Attorney for Defendant Erie Lackawanna Railroad Co.
140 Cedar Street
New York City

Affidavit of Alan F. Perl in Support of Motion for Summary Judgment by Plaintiffs and Intervenor Plaintiffs

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 Civ. 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ALAN F. PERL, being duly sworn, deposes and says: I am one of the attorneys for the plaintiffs and intervenor plaintiffs in this action and am executing this affidavit in support of the instant motion for summary judgment.

This is an action for a permanent injunction. The plaintiffs and the intervenor-plaintiffs are all employees of the defendant Erie Lackawanna Railroad Company. The plaintiffs are members of the Switchmen's Union of North America and the intervenor-plaintiffs are members of the Order of Railway Conductors and Brakemen.

The defendant Brotherhood of Railroad Trainmen is a labor Union holding the colective bargaining agreement with the defendant Railroad. The individual defendants are officers of the defendant Brotherhood. On or about March 14, 1967 and on April 4, 1967 the defendants Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen entered into an agreement which re-

Affidavit of Alan F. Perl in Support of Motion for Summary Judgment by Plaintiffs and Intervenor Plaintiffs

quired in part, that all employes of the defendant Railroad engaged in the crafts of conductors, ticket collectors, baggagemen, trainmen and yard service employees, become and remain members of the defendant Brotherhood of Railroad Trainmen as a condition of continued employment.

As stated above, all of the plaintiffs and intervenor-plaintiffs are and have been members of the Switchmen's Union of North America and the Order of Railway Conductors and Brakemen.

This action was instituted by the plaintiffs by service of a summons and verified complaint requesting, principally, a permanent injunction with regard to the aforesaid compulsory membership section of the agreements between the defendants, on the ground that said section of such agreements are illegal pursuant to the applicable section of the Railway Labor Act.

Application for a temporary injunction was made by plaintiffs by order to show cause dated March 31, 1967. The plaintiffs alleged serious and irreparable damage to them if the clause complained of were to be given effect. The motion came on for argument before Judge Herlands. The pleadings and exhaustive memoranda of law were submitted to him. By his order and opinion dated April 27, 1967 Judge Herlands granted plaintiffs' application for a temporary injunction and the defendants and each of them were enjoined from giving force and effect to the clause complained of.

This Court is respectfully referred to the plaintiffs' memorandum of law submitted in support of the motion for a temporary injunction and the same is incorporated by

Affidavit of Alan F. Perl in Support of Motion for Summary Judgment by Plaintiffs and Intervenor Plaintiffs

reference as if again fully set forth on this motion. The Court is further respectfully directed to the scholarly, well-reasoned and fully documented opinion of Judge Herlands which granted the motion for a temporary injunction. Judge Herlands' opinion is part of the file in this case and your deponent wishes to incorporate it by reference as if fully set forth herein.

After the motion for temporary injunction was granted on behalf of the original plaintiffs, the intervenor-plaintiffs moved for leave to intervene on the ground that they were in exactly the same situation as the original plaintiffs. Judge Murphy granted the motion to intervene and the verified complaint of the intervenor-plaintiffs was then filed and made a part of the record in this case. The Court is respectfully referred to the contents of the verified complaint of the intervenor-plaintiffs as if the same were again fully set forth herein. By further stipulation entered into in the Chambers of Judge Wyatt, the parties agreed that the temporary injunction in favor of the original plaintiffs would have like applicability to the intervenor-plaintiffs. Thus all plaintiffs and intervenor-plaintiffs now stand in the same position.

It is respectfully submitted that there are no contested issues of fact in this matter. The facts are simple. The defendants have entered into an agreement which would force all of the plaintiffs and intervenor-plaintiffs to join the defendant Brotherhood of Railroad Trainmen. It is this provision of the contracts that is contested as being illegal and contrary to the applicable sections of the Railway Labor Act. It is respectfully submitted that the sole

Affidavit of Alan F. Perl in Support of Motion for Summary Judgment by Plaintiffs and Intervenor Plaintiffs

issue before the Court is a question of law. This entire legal question was gone into in depth on the motion for a temporary injunction. The question was decided in favor of the plaintiffs. Judge Herlands resolved the issue of probable success in favor of the plaintiffs, based upon the situation as it exists. He further resolved the question of law before him, on the motion for temporary injunction, in favor of plaintiffs. He could not have granted the motion for temporary injunction without finding the clause complained against was truly illegal within the meaning of the applicable sections of the Railway Labor Act.

There is no need to resolve the question of plaintiffs' original claim for damages, since the temporary injunction was granted and no damages have accrued. In a like manner, the defendants' counterclaim for damages could be an issue only if the contract complained of was valid, as a matter of law. If this Court should resolve the issue of the invalidity of the clause complained of in favor of plaintiffs, then the counterclaim for damages must of necessity be dismissed.

In view of all of the above, your deponent respectfully prays that since there are no issues of fact to be determined on trial, this motion for summary judgment should be granted in all respects.

ALAN F. PERL

(Sworn to June 7, 1967)

Affidavit of Arnold B. Elkind in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

ARNOLD B. ELKIND, being duly sworn, deposes and says:

I am the attorney for the defendant, Brotherhood of Railroad Trainmen (hereinafter the "Brotherhood"), and make this affidavit in opposition to the plaintiffs' motion for summary judgment. The affidavit is also incorporated by reference in support of the Brotherhood's motion for summary judgment dismissing the complaint.

I have represented the Brotherhood since the inception of this litigation and am fully familiar with all of the proceedings heretofore had herein.

Since 1958, I have been a Legal Counsel for the Brotherhood and by reason of that association have acquired a sufficient knowledge of the operation of labor relations in the railroad industry to verify the accuracy of the statements with regard thereto, that are hereinafter set forth.

In the process of preparing for a trial of the proceeding brought by the plaintiffs herein against the Brotherhood I have conducted discovery proceedings, including depositions of the Switchmen's Union, Interrogatories addressed to the plaintiffs, and Requests for Admission. These form

the evidentiary record from which I have made statements with regard to the plaintiffs.

I have studied the legislative history of the 1951 Amendment to the Railway Labor Act, which authorizes and permits a union shop agreement in the railroad industry, including the hearings before the Committees of both the House and the Senate, the Reports on the legislation from the Subcommittee on Labor and Public Welfare of the Senate and from the Committee on Interstate and Foreign Commerce of the House, as well as the Congressional Record reporting the debates and discussion in both the Senate and the House on these amendments.

Based on the knowledge and information thus acquired, the following statements are true to the best of my knowledge, information and belief:

PRIOR PROCEEDINGS

This proceeding was commenced on March 31, 1967 by three employees of the Erie Lackawanna Railroad Company who claim to belong to the Switchmen's Union of North America, and by the Switchmen's Union of North America. They seek to restrain the Brotherhood and the Erie Lackawanna Railroad, the employer of the individual plaintiffs, from putting into operation a collective bargaining agreement which on its face seems to require the plaintiffs and similarly situated employees of the Erie Lackawanna Railroad to join and maintain membership in the Brotherhood. Plaintiffs also seek a declaratory judgment to the effect that the said agreement (hereinafter referred to as the "union shop agreement") "violates Section 2, Fifth and Eleventh (c) of the Railway Labor Act, as amended,

and hence is null and void and of no effect". A claim for money damages has been abandoned.

On April 3, 1967 the plaintiffs served an Order to Show Cause and affidavit in support of an injunction *pendente lite*. Said motion was returnable the following day, April 4, 1967, and was actually argued before Judge Herlands on April 5, 1967. All briefs were submitted by April 6, 1967.

I call to the Court's attention the brief span of time between the making of the motion for the temporary injunction, the argument for the temporary injunction and the final exchange of briefs, because I am firmly convinced that the rush of events impaired my opportunity to familiarize Judge Herlands with all of the facts and circumstances which I now believe were germane to the issue of whether or not a temporary injunction should have been issued in this case.

Furthermore, if the Court will refer to the briefs which were submitted to Judge Herlands, the Court will note that the original memorandum submitted by the plaintiffs in support of the motion was a relatively short document consisting of a little over 4 pages. The plaintiffs' memorandum on which Judge Herlands seems to have relied, judging from his opinion, was a 25 page document with perhaps an additional 100 pages of exhibits and supporting memoranda. This memorandum was submitted by the plaintiffs after argument. I had no opportunity under the Rules to answer the plaintiffs' contentions since they were not made a part of the moving papers in accordance with the usual practice in this Court.

I would further call the Court's attention preliminarily to the circumstance that the defendants, Erie Lackawanna Railroad Company and the Brotherhood, were of the single

mind that resistance to the plaintiffs' motion should essentially be based on the pragmatic consideration that there is and was at no time a threat of immediate irreparable injury to any of the plaintiffs requiring the drastic relief of an injunction *pendente lite* and upon a showing that we were agreeable to an early trial. It was only during the course of argument, when Judge Herlands expressed an interest in the question of whether or not there was any possibility of success on the part of the plaintiffs, that I alluded in my argument to the merits of the controversy, and made brief reference to the legislative history of the union shop provision in the Railway Labor Act; in fact, it was only at that time, that I submitted to Judge Herlands and served on the plaintiffs a memorandum which I had hurriedly prepared on 1 or 2 days notice and which I, in retrospect, mistakenly assumed would clearly demonstrate to Judge Herlands that there was no merit to the position taken by the plaintiffs with respect to the union shop agreement under attack.

I felt reenforced in that view since I learned that the day before in a companion case Judge Julius Hoffman, in the U.S. District Court in Illinois, had held a parallel union shop provision to be valid.[1]

In any event, Judge Herlands seems to have relied heavily on the complaint and answering memorandum submitted by the plaintiffs, the former of which misrepresented facts and the latter of which distorted decisional law and legislative history and which apparently was designed to feed on a lack of understanding of labor relations in the railroad industry. He wrote an opinion supporting the grant-

[1] See additional Requests to Admit dated June 6, 1967, Numbers D and E, containing Findings of Fact and Law and judgment order in that case.

ing of plaintiffs' motion which the plaintiffs now describe, of course, as extensive, thorough and carefully documented, and which they allege sets forth all of the pertinent facts and upon which they rely completely in support of their motion for summary judgment.

It is my view that Judge Herlands' opinion, while seeming to be carefully reasoned, reflects erroneous assumptions, and that the Court can be best guided by considering the issues *de novo*. I say this because the learned Judge did not have the facts which I am about to present to the Court, was misled with respect to Congressional intent based on legislative history, misconstrued the nature of collective bargaining in the railroad industry, and demonstrably misunderstood the impact that his decision, if it became law, would have on the work load of the Federal judiciary.

Following Judge Herlands' decision on the motion for an injunction *pendente lite* I did not oppose an application by the Order of Railway Conductors and Brakemen to intervene as a party plaintiff, along with three other employees who belong to that union, and I also agreed that the temporary injunction be deemed enlarged so as to extend to cover employees who maintain membership in the Order of Railway Conductors and Brakemen as well as the Switchmen's Union of North America, and to employees on the Western District as well as the Eastern District of the Erie Lackawanna Railroad.

Subsequent to the granting of the injunction *pendente lite*, and on May 16, 1967, Judge Herlands fixed the security to be paid by the plaintiffs in the sum of $10,000.00.

Affidavit of Arnold B. Elkind in Opposition to Plaintiffs' Motion

FACTS WHICH THE BROTHERHOOD BELIEVE ESSENTIAL TO AN UNDERSTANDING OF THE ISSUES

Before discussing the pleadings and issues of law and fact, it seems to me that the Court should be aware of certain aspects of railroad unionism, so that the consideration of the problem at hand will not be "in a vacuum".[2]

Perhaps the first fact with respect to labor relations in the railroad industry which should be understood by the Court is with respect to the nature of individual job security, job benefits and seniority rights. While seniority rights and job benefits are enforced by labor unions, they in no sense relate to or are coincident with union membership. All seniority dates from the beginning of the employer-employee relationship in the particular craft in which the employee is engaged. The date of employment in a particular craft becomes the seniority date. The date of union membership, as well as the fact of membership in any union, is irrelevant to the issue of seniority. I am not aware of any job benefits which are in any sense dependent upon union membership.

If an employee has a particular grievance or a claim against his employer, or is allegedly mistreated by his employer, it is the duty under the law of his duly authorized collective bargaining agent, if requested to do so, to represent that employee. It must do so without discrimination, regardless of whether or not the employee belongs to the union.[3] Union membership is irrelevant to that issue.

Collective bargaining traditionally is carried on throughout the railroad industry on a railroad craft basis. This is

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[2] *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 488 (1957).

[3] *Brotherhood of Sleeping Car Porters* v. *Thompson*, 367 F.2d 489 (4th Cir. 1966).

initiated by the service of notices under Section 6 (45 U.S.C. §156) of the Railway Labor Act. Negotiations must inure equally to the benefit of all employees in the crafts or classes which the union represents. There can be no discrimination as a matter of law in any collective bargaining procedures conducted by the collective bargaining agent for the craft or class.[4] Union membership is irrelevant insofar as whether or not an employee is entitled to the beneficial results of collective bargaining efforts.

The collective bargaining agent can be held liable in damages for misfeasance or nonfeasance in representing employees. [A verdict of $56,500.00 was recently obtained against a railroad union based on a dereliction to an employee who was not a member of that union, and the Supreme Court denied certiorari in March of 1967.[5]] The responsibility of unions to perform adequately as collective bargaining agents and as grievance advocates exists for the benefit of all employees, whether union members or not.

As a matter of law, the Brotherhood cannot deprive a man of his employment or job benefits if he is willing to financially bear his pro-rata share for the union's efforts with his employer. Both the Railway Labor Act and union shop agreements (including the one under attack here), safeguard employment rights with respect to any employees to whom membership in the Brotherhood is not available upon the same terms and conditions as are generally applicable to any other member. Furthermore, even assuming there were employees to whom membership in the Brother-

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[4] *Steele* v. *L & N R.R. Co.*, 323 U.S. 192 (1944). *Turnstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

[5] *Brotherhood of Sleeping Car Porters* v. *Thompson, supra*, cert. den. —— U.S. ——, 18 L.Ed. 2nd 110 (1967).

hood was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership, such employees are simply not required to become members of the Brotherhood but can continue their employment freed of obligation to the Brotherhood. This is in strict accordance with the statutory safeguard set forth in paragraph Eleventh (a) of Section 2 of the Railway Labor Act [45 U.S.C. 152 Eleventh (a).]

The practical effect of this contractual and statutory safeguard is to make irrelevant any questions of discrimination by reason of color, creed, anti-union activities, support for competing unions, political beliefs of employees, or the religious convictions of any employee against joining unions, or, as here contended, the constitutional provisions of the Brotherhood constitution. All that is necessary is that the employee tender his dues, initiation fees and assessments (which must be uniform). If the Brotherhood refuses to accept dues or refuses membership upon any ground other than non-payment of dues, such an employee is entitled to continue his employment and enjoys the status of a "free rider" exempt from the burdens of paying dues or belonging to a railroad union. This, as a practical matter, inhibits the Brotherhood from enforcing such provision in its Constitution as the plaintiffs refer to in their complaint, assuming such provision does in fact exist at the present time and regardless of the interpretation placed thereon by the plaintiffs.

I point these matters out to the Court so that it may be clearly understood that there is no particular mystique surrounding union membership in the railroad industry and

that there is nothing sinister in seeking to impose upon employees the duty of financially supporting the instrumentality which has the duties and burdens under the Railway Labor Act of representing 100% of the employees with management. As I will later show, this was the principal objective of the 1951 Amendments to the Railway Labor Act authorizing the union shop.

The defendant, Erie Lackawanna Railroad Company, came into being in 1960 as the result of a merger and acquisition proceeding duly approved by the Interstate Commerce Commission pursuant to Section 5(a) of the Interstate Commerce Act [49 U.S.C. §15(2)] and Section 20(a) of the Interstate Commerce Act [49 U.S.C. §20(a)]. The properties thus merged were originally the Erie Railroad Company and the Delaware, Lackawanna & Western Railroad Company. In the 7 years of the Carrier's existence the Brotherhood, though challenged for representational authority on two occasions by the Switchmen's Union of North America on September 22, 1961 and again on September 11, 1964,[6] has been the only collective bargaining agent certified or recognized by the National Mediation Board[7] and authorized to represent for the purposes of the Railway Labor Act the craft and classes of Road Conductors, Yardmen (Switchmen) and all other Train Service employees on the Erie Lackawanna Railroad.[8] Neither the Switchmen's Union of North America nor the Order of Railway Conductors and Brakemen have any contractual

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[6] Answers to Interrogatories by Switchmen's Union, No. 16.

[7] Procedure established by Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 102, Ninth.

[8] Copy of certification of May 7, 1965 annexed to Requests for Admission dated June 6, 1967, and admitted (No. C).

relationship with the Erie Lackawanna Railroad.[9] Neither of these unions have ever been certified or recognized by the National Mediation Board as the duly designated representative of any of the employees of the Erie Lackawanna Railroad.

The Brotherhood does the collective bargaining for all Train Service employees on the Erie Lackawanna Railroad. As an indication of the services rendered by the Brotherhood, there is annexed hereto as defendant's Exhibit 1 a letter dated June 1, 1967, from the Erie Lackawanna Railroad Company, to the General Chairman for the Western District of the Brotherhood, setting forth a number of subjects that are presently on the collective bargaining table for negotiation in order to improve the rules and working conditions of the employees.

Exhibits 2 through 11 are examples of the types of agreement worked out by the Brotherhood for the benefit of *all employees* in the crafts which it represents, including these six individual plaintiffs and their co-unionists. The exhibits are not all-inclusive but rather sampling. In order to police the various agreements, handle the grievances and time claims of the employees, and carry out its collective bargaining responsibilities on the Erie Lackawanna Railroad, the Brotherhood expends substantial sums of money. In the year 1965 these services cost the Brotherhood $113,683.41. In the year 1966 the Brotherhood expended the sum of $105,538.32, and for the first 3 months of 1967 the

[9] In a deposition, the Switchmen's Union claimed to have a contractual relationship on the subject of job protection in the event of coordination. This "stretched" conclusion arose from the fact that a national agreement was executed by all railroad unions in May of 1936 (commonly called the Washington Job Protection Agreement), which is still operative and in effect.

Brotherhood expended $30,898.84. In other words, in 27 months the Brotherhood expended a grand total of $250,120.57 for the benefit of the employees which it represents on the Erie Lackawanna Railroad.[10]

No money was received by the Brotherhood for this purpose from any source other than the dues paying members on the Erie Lackawanna Railroad, and neither the Switchmen's Union organization nor the Order of Railway Conductors and Brakemen organization, nor any of the employees who allegedly satisfy their union shop responsibilities by belonging to the Switchmen's Union and the Order of Railway Conductors and Brakemen, make any contributions to the Brotherhood or reimburse the Brotherhood for any of its expenses.[11]

The plaintiffs have given varying figures with respect to the number of employees whom the Brotherhood represents but who pay dues to these other two competing and dissident unions. A figure of 500 is mentioned in the complaint, but in sworn testimony the figure appears to be approximately 400[12] or less who pay dues to the Switchmen's Union of North America. It would seem that another 250 or 300 pay dues to the Order of Railway Conductors and Brakemen rather than the Brotherhood of Railroad Trainmen. It is my understanding that there are over 3000 employees in the crafts and classes represented by the Brotherhood of Railroad Trainmen. The higher dues structure of those men who pay dues to the Brotherhood of Railroad Train-

[10] Requests to Admit, Nos. N, O and P, dated May 23, 1967.

[11] Answers to Interrogatories, No. 15, by Switchmen's Union of North America.

[12] Deposition of General Chairman Mastronardi of Switchmen's Union (p. 16).

men reflects the cost of rendering services to the men who have joined the Switchmen's Union and the men who have joined the Order of Railway Conductors and Brakemen. The Order of Railway Conductors and Brakemen and the Switchmen's Union can profitably, and do, charge lower dues than is required of the Brotherhood members.[13] This variance in dues structure feeds on itself and induces employees to satisfy their union shop requirement by selecting the organization with the "cut-rate" dues structure, thereby exacerbating the inequity.

Furthermore, the grievance procedures on the Erie Lackawanna Railroad lend themselves to a facade of representation by the competing and dissident union which has no contract and no status with the carrier. This comes about by virtue of the fact that an employee having a grievance is entitled to be represented by any person of his choice. There is no requirement that he be represented in grievances by his duly authorized collective bargaining representative. He may utilize the services of someone who is a complete stranger to the contract, to the property, to the working conditions, and he has the right to use such an individual of his choice in appeals even to the ultimate compulsory arbitration tribunal in the railroad industry—the National Railroad Adjustment Board. The Switchmen's Union, therefore, maintains an organizational entity on the Erie Lackawanna Railroad with 15 officers strategically located on the system who will, and do from time to time, represent employees in grievance controversies involving the inter-

[13] As low as 50¢ local dues for Switchmen's Union (deposition of Mastronardi, p. 18). Over-all dues are about $48.00 less per year than the Brotherhood dues. Dues vary from local to local.

pretation of the Brotherhood's contracts with management.[14]

Furthermore, as unions national in scope and organized under the Railway Labor Act, each of these competing unions is entitled to, and does have, representatives on the National Railroad Adjustment Board, and on two or three occasions in national emergency situations both the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America[15] have been party to highly publicized proceedings, thereby enhancing the impression that they are in some way involved in the collective bargaining procedures which the Brotherhood in fact carries on for all employees in the craft or classes on the Erie Lackawanna Railroad. This veneer of involvement impinges upon the intrinsic morality of the Brotherhood's pleas for the voluntary support to which it alone is entitled by virtue of its bargaining activities. Moreover, the true picture of the Brotherhood's comprehensive acts of representation can become muddied in the minds of employees. Instances of inter-union cooperation on the national level are few and exceptional.[16]

Furthermore, as an organized group of grandstand quarterbacks and critics, the competing unions are in the position to disseminate on an organized basis, and do disseminate on an organized basis, criticisms, second guesses, carping analysis and misrepresentation of the efforts of

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[14] See Answers to Interrogatories, No. 35, by Switchmen's Union, and deposition of Mastronardi, pp. 23-26.

[15] Like the fireman on diesel, and the crew-consist issues raised by the railroads nationally in their "Anti-Featherbedding Campaign", leading to Presidential study commissions, Presidential Emergency Boards, etc. in the Eisenhower and Kennedy Administrations.

[16] Deposition of Switchmen's Union, by Neil Speirs, p. 48.

the Brotherhood, thereby inevitably creating labor unrest and dissatisfaction on the carrier's property.[17]

In past years, when the Switchmen's Union felt that it had stirred up enough resentment against the Brotherhood it petitioned the National Mediation Board to obtain certification whereby it might replace the Brotherhood as the certified collective bargaining representative.

The General Adjustment Committee of the Switchmen's Union of North America meets once every 4 years. The membership of the Committee consists of the 15 officers on the property. They elect one of their number as General Chairman. Their fixed expenses aggregate $60.00 per month for a part-time secretary. Their officers are unpaid but receive the approximate equivalent of a day's pay on the railroad from the union when they are engaged in activities on behalf of the Switchmen's Union.[18] The Brotherhood, on the other hand, maintains 2 General Committees on the property, with full-time salaried General Chairman, full-time employees, and with such facilities and expenses as are necessitated by its collective bargaining responsibilities.

As I have heretofore indicated, union representation in the railroad industry is on a craft or class (of employees) basis.[19] There are approximately 23 unions who represent various crafts and classes of employees on the railroads

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[17] See supporting affidavits of officers of Brotherhood of Railroad Trainmen. See also Exhibit 12.

[18] Deposition of Switchmen's Union by Mastronardi; Answers to Interrogatories by Switchmen's Union, No. 29.

[19] This is true even when one union represents all crafts and classes employed by the entire railroad. (See Requests to Admit, Nos. H, I, J and K, of May 23, 1967). *Rohrer* v. *Connemaugh & Black Lick R. R.*, 359 F.2d 127 (3rd Cir., 1966)—United Steelworkers.

throughout the United States. All but 5 or 6 of these unions represent non-operating employees (commonly referred to as the "Non-Ops"). In the generally accepted usage there are 5 unions representing operating employees (sometimes referred to as the "Five Ops"). The 5 operating unions are sub-divided into 2 "Engine Service" unions (the Enginemen and Firemen) and the 3 "Train Service" unions. The 3 "Train Service" unions are the parties to this dispute. It is theoretically possible for 2 or even all 3 of these "Train Service" unions to have simultaneous collective-bargaining responsibility on a given railroad, each being a duly designated collective bargaining representative for a particular craft or class of "Train Service" employees. For example, the Brotherhood could be certified for Road and Passenger Brakemen, the Switchmen's Union for Yard employees, and the Order of Railway Conductors and Brakemen for Conductors.

The crucial fact with respect to the Erie Lackawanna Railroad, however, and the determinative fact in this proceeding, is that on the Erie Lackawanna Railroad the Brotherhood of Railroad Trainmen is the sole and exclusive collective bargaining representative for *all* the operating "Train Service" employees.[20] It is this single fact which, in my opinion, makes the union shop agreement which is under attack here legal and properly authorized by the Railway Labor Act. The plaintiffs have admitted that none of them, and no other members of the crafts or classes they assert to represent in this proceeding, hold employment rights with the Erie Lackawanna Railroad in any craft or class other than classifications which are

[20] Requests to Admit, No. 2 (a) to (g) inclusive, of May 23, 1967.

exclusively represented by the Brotherhood on the Erie Lackawanna Railroad.

It may be parenthetically observed at this time that the plaintiffs have also admitted that there has been no threat made to discharge any employee purported to be covered by the union shop agreements under attack, and that there have been no discharges pursuant to the union shop agreements under attack. The union shop agreement in question contains a number of procedures designed to protect individuals from wrongful discharge pursuant to its terms. The plaintiffs have agreed that not only has no individual been threatened or discharged—they have also agreed that no individual has invoked any of the procedures set forth in the agreement designed by the contracting parties for the protection of the individuals.[21]

Parallel union shop agreements to that under attack here have been negotiated on a number of other railroads and are in operation. Annexed to the Requests for Admission served by the Brotherhood on the plaintiffs on May 23, 1967, are copies of such agreements in effect on 7 other railroads.[22] One of these was attacked by the Switchmen's Union in the U.S. District Court in Chicago, and the Findings of Fact and Conclusions of Law leading to the dismissal after trial of the complaint in that case were filed with the Court as part of defendant's Requests for Admission under Rule 36 on June 7, 1967 [Items (D) and (E)]. The Requests for Admission under Rule 36 which were served and filed on May 23, 1967, have not been denied by the plaintiffs, and all such requests for admis-

[21] Requests to Admit, No. 2 (I), (J) and (K) inclusive, of May 23, 1967.

[22] Requests to Admit, No. 1 (a) to (g) inclusive, of May 23, 1967.

sion must be deemed as stipulated facts for the purposes of this motion.

THE PLEADINGS

After identifying the parties (¶ 1-7) and setting forth some irrelevant historical background (¶ 8-10), the complaint alleges the making of a collective bargaining agreement which is marked Exhibit A and made a part of the complaint. (¶ 11). The Brotherhood has admitted the making of the collective bargaining agreement,[11] but denies the truth of the balance of the allegations in an answer duly verified by W. J. Weil, its Vice President, on April 5, 1967.

It is alleged in Paragraph 11 that the bargaining agreemetn became effective immediately. This was not true, since the Railway Labor Act is a controlling instrumentality on the contract and its provisions are deemed to have been incorporated in the agreement. This agreement therefore was intended by the parties to become operative 60 days after its execution, in accordance with the Railway Labor Act. The written agreement need not and does not, by any means, contain all the terms and conditions of the agreement between the parties.

All of the provisions of the Railway Labor Act control the contract, whether or not the language of the Act is incorporated in the agreement in *haec verba*, and the language of the Railway Labor Act controls and is superimposed on the contract as implied terms thereof.

I will deal with Paragraph 12 of the complaint hereinafter in explaining why the defendant, Brotherhood of Rail-

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[11] Answer of Brotherhood, Paragraph 5.

road Trainmen, is moving for summary judgment upon the ground that there is no justiciable controversy.

In Paragraph 13 of the complaint the plaintiffs contend that the constitution of the Brotherhood will not permit them or other members of the Switchmen's Union to become and remain members of the Brotherhood.

The answer of the Brotherhood denies the interpretation placed upon the constitution of the Brotherhood by the plaintiffs. Furthermore, this allegation is entirely irrelevant to the question of whether or not the plaintiffs would suffer any injury if the injunction were vacated and the agreement was permitted to become operative. As I have heretofore shown to the Court there are fool-proof safeguards, both statutory and in the agreement, which completely protect members of the Switchmen's Union and members of the Order of Railway Conductors and Brakemen from being discharged by the Erie Lackawanna except for a refusal to "tender dues". Assuming that any Switchmen's Union member or O.R.C.&B. member were denied membership in the Brotherhood, he would lose no seniority, no job benefit, and would lose no employment right whatsoever. He would, in fact, gain the ultimate status of continuing as a "free rider" employee exempt from the requirement of paying dues to the Brotherhood.

Finally, the plaintiffs contend (¶ 14) that some of them carry group insurance with either the Equitable Life Assurance Society or with the Aetna Insurance Company and that they would lose these insurance rights if the agreement requiring them to join the Brotherhood is enforced. I have examined copies of the policies referred to in the Switchmen's complaint. The Equitable Life Assurance policy No. 16222 provides that on the termination of the

member's membership his spouse is entitled to have issued, without evidence of insurability and upon payment of premium applicable to the class of risk to which the spouse belongs, and individual policy of life insurance in any one of the forms then customarily issued by the Society in an amount equal to the amount of insurance with respect to the spouse under said group policy ceasing because of such termination.

I have also examined the Aetna Life Insurance policy, Group Policy No. T 47350, and have determined that upon termination of membership the member is entitled to have issued to him by the insurance company, without evidence of insurability, an individual policy in an amount equal to, or at the option of the member in an amount less than, a certain formula therein set forth.

In any event, whether or not a member purchases life insurance under either of these plans is entirely voluntary, optional with the employee, and in the context of this dispute and in the light of the conversion privileges and conversion requirements under the New York Insurance Law §§ 161(e) and 162(5) and (6) (since the policies are controlled by New York law), together with the availability of similar insurance from other sources, it is an abuse of terms to describe these as valuable "property rights".

Furthermore, these property rights need not be lost or placed in jeopardy. If any member determined that it was his desire to continue his group insurance and felt it reasonable to continue his membership in the Switchmen's Union for that purpose, or indeed for any purpose, such an employee could do so without fear or hindrance. The

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Brotherhood does not and cannot, as a practical matter, compel any individuals to cease to be members of the Switchmen's Union or any other union or association should they so desire.

It may be pertinent to observe that the attention of Congress was called to the possibility that insurance benefits might be lost as a result of the requirements of a union shop transfer, and it was taken for granted, probably because potential injury was thought negligible, that this effect could be borne without undue hardship. [Hearings before the Committee on Interstate and Foreign Commerce on H.R. 7789, 81st Cong. 2d Sess.; testimony of Daniel P. Loomis at p. 159]. But the allegation that the plaintiffs must lose insurance coverage is untrue in any event for the reasons stated above.

Paragraph 15 of the complaint falsely states that "The defendant ERIE LACKAWANNA RAILROAD COMPANY has threatened to discharge the individual plaintiffs and the members of the class they represent and each of them * * *." This essential paragraph of the complaint has been denied, and the Requests for Admission confirm the denial of these threats.[24]

Paragraph 17 of the complaint alleges:

> "The requirement that the plaintiff and the other members of the class they represent must join and maintain membership in the defendant BROTHERHOOD OF RAILROAD TRAINMEN as a condition of employment deprives said persons and each of them of the right to

[24] See details set forth in exposition of contention that there is no justiciable controversy, *infra*, p. 21 ff.

join and remain members of the union of their own choice."

This is not true. The requirement that the plaintiffs and other members of the class they represent in this litigation must join and maintain membership in the defendant, Brotherhood of Railroad Trainmen, as a condition of employment, permits the plaintiffs and the other members of the class they represent in this litigation to be free to join or remain members in any other union whatsoever. On the other hand, if these plaintiffs and any and all other employees similarly situated decide that they do not wish to pay dues to two unions then, of course, they are free to terminate their membership in the Switchmen's Union without jeopardizing any seniority, job benefit or employment right or privilege. But such a decision would be in in the same category, for the purposes of this litigation, as a decision whether or not to belong to the Knights of Columbus or the Elks or the Masons, who are also out of official status or contractual responsibility with the Erie Lackawanna Railroad. Membership in a union other than the Brotherhood is entirely a matter of free choice for the employee.

Paragraph 18 of the complaint alleges that the plaintiffs and each of the other members of the class they represent "has seniority rights entitling him to preferential employment by the defendant railroad which constitute valuable property rights which will be lost in the event of a discharge for failure to join and maintain membership in the defendant BROTHERHOOD OF RAILROAD TRAINMEN" as required by the agreement. Of course, if an employee were to be discharged from employment he would

lose his seniority. He would also lose his income and means of livelihood. His seniority is dependent solely and exclusively upon the date of his employment with the Erie Lackawanna Railroad Company; it has nothing to do with his continued membership in the Switchmen's Union of North America. Accordingly, his seniority will be unaffected by his joining the Brotherhood.

Since the plaintiffs have agreed, however, that no one has been discharged or threatened with a discharge, there is no property right placed in jeopardy by the execution of the agreement.[25]

Paragraph 19 of the complaint alleges that under Section 2 of the Railway Labor Act the defendant Erie Lackawanna Railroad Company may not interfere with or coerce employees from exercising their right to join and designate the Switchmen's Union as their representative. This allegation of the complaint is completely irrelevant to the controversy. The Erie Lackawanna Railroad has not interfered with or coerced the employees from exercising their right to join and designate the Switchmen's Union as their representative. All that they have done is to agree with the Brotherhood, in accordance with the authority of the Railway Labor Act, that the employees in the crafts and classes represented by the Brotherhood should join the Brotherhood and support its collective bargaining activities.

Paragraph 20 of the complaint alleges that membership of the plaintiff employees in the Switchmen's Union constitutes a valuable contract and property right of each of the plaintiffs. This is denied; the Switchmen's Union of

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[25] See discussion regarding absence of justiciable controversy, *infra*, p. 21 ff.

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North America is an unincorporated association. Paragraph 20 goes on to allege that the conduct of the defendants has unlawfully interfered with such contract or property rights. This simply is not true. The defendant Brotherhood has done nothing whatsoever to interfere with the freedom of association of any of the employees whom it represents. It only asks that in addition to other interests which the employees may support, they also support the work that is carried on for their benefit by the Brotherhood.

Paragraph 21 of the complaint alleges that "The conduct of the defendants and each of them has caused and threatens to cause each of the plaintiffs and each of the members of the class they represent irreparable injury for which no remedy in damages is available." This paragraph is denied and there is absolutely no factual basis to support the allegations of irreparable injury. In fact, the admissions in this case make it crystal clear that there is no injury or threat of injury to any of the plaintiffs.[26]

Paragraph 22 of the complaint (denied by defendants) alleges damages to the Switchmen's Union; that claim has been withdrawn.

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[26] See footnotes 24 and 25.

[27] Under Section 2, Fourth (45 U.S.C. 102, Fourth), carriers are prohibited from coercing employees to join a union.

Under Section 2, Fifth (45 U.S.C. 102, Fifth), it is unlawful for a carrier to have an employee sign an agreement promising to join a union.

These prohibitions were relaxed by the 1951 Amendment authorizing the union shop. However, should a carrier compel an unauthorized form of union security agreement it would be subject to the criminal penalties provided in Section 2, Tenth (45 U.S.C. 102, Tenth).

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The complaint of the intervening plaintiffs is in all respects an adaptation of the complaint filed on behalf of the members of the Switchmen's Union, and rather than repeat and extend the analysis of that complaint I allege that the factual contentions of the Brotherhood of Railroad Trainmen apply with equal vitality to rebut the contentions in the complaint filed on behalf of the intervening plaintiffs.

THERE IS NO JUSTICIABLE CONTROVERSY

The Notice of Motion for summary judgment and the affidavit of Alan F. Perl, sworn to the 7th day of June, 1967, withdraws any claim of damage on the part of the Switchmen's Union of North America. He admits (page 4, last paragraph): "There is no need to resolve the question of plaintiffs' original claim for damages since the temporary injunction was granted and no damages have accrued". It is to be noted that the Switchmen's Union does not allege any damage to itself as an unincorporated association in the original complaint and does not purport to have any interest in the demand for injunctive relief and for a declaratory judgment in its capacity as a labor union. It only seeks to prevent "irreparable injury" to the employees which it represents and the individual plaintiffs. What is the damage and the injury which the plaintiffs seek to avoid?

The plaintiffs allege in Paragraph 11:

> "The defendants BROTHERHOOD OF RAILROAD TRAINMEN and ERIE LACKAWANNA RAILROAD COMPANY have threatened and are threatening to discharge the plaintiff JOHN P. O'CONNELL, R. A. GALLO and CHARLES DOYLE

and all the other members of the plaintiff SWITCHMEN'S UNION who are employed by defendant railroad unless they cease to be members of the plaintiff SWITCHMEN'S UNION and become and remain members of the defendant BROTHERHOOD OF RAILROAD TRAINMEN."

The Brotherhood in its Answer denies this allegation. Moreover, on or about May 23, 1967 the Brotherhood served Requests for Admission under Rule 36. The following 3 allegations were admitted to be true by the plaintiffs' failure to deny:

"(I) That there have been no discharges by the Erie Lackawanna Railroad pursuant to the union shop agreements of March 14, 1967 (Eastern District) and April 4, 1967 (Western District)."

"(J) That there has been no threat made to discharge any employee purported to be covered by the union shop agreements dated March 14, 1967 and April 4, 1967, by the Erie Lackawanna Railroad Company."

"(K) That no individual has invoked any of the procedures contained in the union shop agreements annexed to the complaint."

In the absence of any discharges or threats to discharge the individual plaintiffs or any members of the class which they represent, and in light of the facts hereinbefore informing the Court of the irrelevance of plaintiffs' claims regarding loss of seniority and job benefits and of the insurance conversion privileges of plaintiffs, no injury or imminent harm is made out by plaintiffs. Therefore,

plaintiffs do not have standing to raise the issue of the legality of the union shop contract involved here. There is no justiciable controversy.

The Court is merely being asked for an advisory opinion, and Judge Herlands, by writing a lengthy opinion regarding his interpretation of Section 2, Eleventh (c) of the Railway Labor Act has, in fact, opened the doors of the Federal courthouse to similar challenges by railroad employees who may seek to avoid any risk and obtain advice in advance that it is satisfactory for them to pay dues to other unions than those authorized by the National Mediation Board to represent them as collective bargaining agents.

Criminal Intent to Violate Railway Labor Act Cannot be Presumed

In a companion set of papers the Brotherhood is moving for summary judgment dismissing the complaints. In support of that motion we are showing to the Court that the union shop agreement which is set forth in the complaint, and admittedly executed by the Erie Lackawanna Railroad and the Brotherhood, does not constitute the entire agreement between the parties. Both the Erie Lackawanna Railroad and the Brotherhood operate under the Railway Labor Act and are issues of fact based on these affidavits, I respectfully direct the Court's attention to the following facts with respect to the legislative history of the changes in the Railway Labor Act authorizing union shops. These facts, I believe, establish the propriety in operation of the union shop contract which was entered into between the Erie Lackawanna Railroad Company and the Brotherhood and which the plaintiffs attack.

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The legislation originally introduced was designed to permit the unions on the railroads to bargain for union shops in the same manner as was permitted in industries generally following the enactment of the Taft-Hartley Act.[21] The Senate Bill introduced to accomplish that purpose was S. 3295. The companion Bill in the House of Representatives was H.R. 7789. The Senate hearings were conducted in May of 1950. The hearings in the House were conducted in May, 1950 and were concluded on June 7, 1950.

The principal spokesman for the Bill in both Houses was George M. Harrison, who represented 21 standard railway labor organizations. Much of Mr. Harrison's testimony before Congress dealt with the purposes of the proposed amendments. In his testimony he dealt in part with the public's interest in the Railway Labor Act in general, and with the union shop provisions in particular. He emphasized that under the Act a moral duty was imposed on an employee to "exercise his right to participate in the selection of his representative and then bow to majority rule and participate in the collective action through support of the union which represents him." [House hearings, p. 9.] • • • "Under the Act the collective-bargaining representative is required to represent all of the members of the craft or class which it represents fairly and equitably, and without regard to membership or nonmembership in the union." [supra] He said (p. 10):

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[21] Labor-Management Relations Act of 1947, 29 U.S.C. 151, 158(a)(3), 159(a).

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PURPOSES OF UNION SHOP—FAIRNESS*

"Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of those activities without contributing anything to the cost. This is especially true when the collective bargaining representative is one from whose existence and activities he derives most important benefits and one which is obligated by law to extend these advantages to him. * * *

PUBLIC INTEREST

"The public also has a great interest in having all members of the bargaining unit participate in the formulation of bargaining policies of the organization. If all members of the craft or class participate, the bargain reached with the employer is most likely to reflect interests and desires of the group as a whole. * * * On the other hand, if only 51 percent of the bargaining unit are members, the policies of the craft or class can be determined by only 26 percent of the group. * * *

MORALE OF EMPLOYEES

"The morale of employees will eventually be improved if all employees participate in the bargaining process. There will be less complaint about the negotiation of contracts and the handling of grievances by the organizations to which they do not belong. Representation

* Headnotes not part of Harrison testimony.

disputes should be reduced under union shop conditions." (P. 11) "The employer has more assurance that his contract, once made, meets with the approval of a greater number of his employees.

REDUCTION OF GRIEVANCES AND ELIMINATION OF GRIEVANCE PROCEDURE AS BATTLEGROUND FOR RIVAL UNIONS

"There will be a more uniform approach in the application of the rules. Individual employees will be more inclined to have grievances handled by their representatives rather than to handle them themselves. Fewer disputes will be processed because the union will be in a better position to reject unsound claims. This should result in a substantial reduction in court cases and cases submitted to the National Railroad Adjustment Board. The grievance procedure will cease to be a battleground for rival unions.

ELIMINATION OF UNNECESSARY CONTROVERSIES

"It is axiomatic that union members resent having to work side by side with 'free riders' who are enjoying benefits procured by the money, time, and effort of union employees, and who at the same time are apt to be critical of union policies. There is no question that this condition tends to result in a lowering of morale, and I can say from experience that it results in many unnecessary disputes and controversies.

ELIMINATION OF RAIDING AND CARPING CRITICISM

"The union shop makes it more difficult for one union to raid another and thus eliminates or reduces weeks

and months of turmoil among employees in the involved group. Employees who participate, through membership, in the formulation of their own wages, rules, and working conditions will be much less susceptible to irresponsible appeals and unjustified criticism of rival unions.

"Where all employees are members of the union, it is just as easy to change the policies of their organization through the democratic process available to them as it is to change the collective bargaining representative.

IMPROVED DISCIPLINE OVER SUB-STANDARD WORK PERFORMANCE

"Unions have been criticized for lack of responsibility. In the absence of disciplinary power over individual employees which the union shop gives, the union is seriously handicapped in preventing, unauthorized work stoppages, poor workmanship, lack of efficiency, and other conduct which is the frequent source of management complaints. This is particularly true in the railroad industry where operations are widely scattered and supervision made difficult."

Other witnesses testified with respect to the general purposes of the union shop in the railroad industry and what it was thought might be accomplished by the enactment of such legislation for both the general public and the union. William Grogan, representing the Transport Workers Union, explained to the House Committee on Interstate and Foreign Commerce (p. 28):

"It is also a fact under open-shop conditions there is a demand on union leadership forever asking improve-

ments in wages and working conditions without regard to their practicability or even their possibility of achievement. The union has to bid for membership and it is forced into a perpetual war with the employer to retain that full membership which a union requires to be effective. * * *"

Management witnesses testified both in the House and the Senate to support an open shop. But Mr. Harrison testified (p. 249):

"As a practical matter, however, the fact that all of the members of a craft or class may be required to join a union as a condition of employment will do much to discourage raiding by other labor organizations. The rivalry between unions will be decreased rather than increased by reason of the fact that the class or craft will be fully organized and all of its members will belong to the organization representing the members of such class or craft."

Similar testimony was given before the Senate.

It is crystal clear that the main purpose of the legislation was to give railroads and the unions representing employees on the railroads the benefit of the parallel provisions of the Taft-Hartley Act. [96 Cong. Rec., Senate, September 23, 1950, p. 15736; December 7, 1950, p. 16268]. On January 1, 1951 Congressman Biemiller said (96 Cong. Rec., House, 17055):

"Those of you who voted for the Taft-Hartley Law have voted for a similar provision for industry. * * * The rest of American industry nationwide has accepted the

provision of the union shop. That issue is not debated any more in labor-management circles. • • •

All you are being asked to do is to okay a provision that gives to railway labor the right to bargain for the union shop just as any other labor group in the country may do. • • • But actually there is one simple issue before the House of Representatives today and that is, are we going to give to railway labor the same right to bargain for a union shop that we have given to labor in industries throughout the United States?"

And then—Congressman Hugh D. Scott, speaking thereafter, said (p. 17055):

"The Labor-Management Act of 1947 is the law of the land. In the interest of consistency and as the result of the enactment of that Act and of the natural desire of other labor organizations to enjoy some of its benefits, we are faced with the responsibility of seeing to it that the law works and that it is properly extended under legislative conditions as this Bill proposes.

The Bill that we are now considering extends to the railroad workers and employees of common carriers by air a great principle embodied in the Taft-Hartley Act. It has extended such benefits to much of the Nation's labor population in the Taft-Hartley Act. • • • It will promote peaceful solutions and stability of relationship between labor and management in the industries concerned. I am satisfied that that is the purpose, and that that will be the effect of the Bill. It is not radical; it is common justice."

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Other Congressmen who discussed the Bill drew corresponding parallels [Congressman Crawford, p. 17056; Congressman Bennett, p. 17056; Congressman Heselton, p. 17056; Congressman Crosser, p. 17056, 17057; Congressman Sullivan, p. 17057; Congressman McGuire, p. 17057]; and similar thoughts were echoed in the earlier Senate debates by floor-manager Senator Lister Hill, p. 15736, 16261.

Congressman Linehan's remarks in support of the legislation on January 1, 1951 are worthy of repetition in connection with the instant litigation. He said (p. 17058):

> "It [the union shop] reflects the American spirit of fair play. It provides that those who accept the benefits secured by an organization shall also share equally in the expense of operating such organization.
>
> 'Free riders'—those who seek to get something for nothing are resented in every walk of life, and justly so. We all believe no man should shirk his responsibilities. None among us will deny that all who benefit from the services provided by organized society, through government, should help pay the cost of government. Why should not the same principle apply to workers who secure the benefits of trade unionism? * * * This measure is the very essence of democracy. It encourages 100% membership and 100% participation in the activities of a union. Thereby the policies formulated by a union will more truly reflect the wishes of the great majority.
>
> This Bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the

'free riders' in their midst—the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved.

Such a situation creates friction. It makes for hard feelings. It lowers morale. It affects output and productivity. Without question, correction of such situations will raise morale and make for greater productivity. Under the union shop, workers will be pulling together. Each man will be bearing his proper share of the load. This should undoubtedly result in improved productivity and greater harmony which will be equally beneficial to the employees, the management and the public. * * * Certainly collective bargaining can function more effectively if the union voices the sentiments of all the employees and if it is supported by all the employees.

The union shop is an old established American institution. It has existed in many industries for decades and has made for stability. It is welcomed by many employers as an aid to discipline and efficiency in the shop. Fair employers who operated under union-shop conditions would frankly declare they would never go back to the irresponsibility and the confusion of the open-shop."

While the Court may feel that I have dwelt unduly on what perhaps was obvious, I have done so because the interpretation of the union shop provision which is urged by the plaintiffs in this case would defeat substantially all of the advantages which Congress believed it was legislatively making allowance for, to the benefit of the public generally, the railroad industry, and the railroad unions.

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If a union which is a legal stranger to a particular railroad can, by virtue of the fact that it is organized under the Railway Labor Act and is national in scope, siphon off dues to finance a perpetual battle for representation rights, then all of the salutary effects that I have discussed may be effectively negated. It seems evident, and irrefutably evident, that this was never the intention of Congress in authorizing alternative union shop membership for employees in the operating unions. The grant of the preliminary injunction below reflects a kind of myopia which, in looking at the trees, completely misses the forest. The general remedial purpose of the legislation authorizing the union shop has been wholly obscured and overlooked as a consequence of viewing the Railway Labor Act amendment to Section 2 "in a vacuum"—a practice which the Supreme Court in *Rychlik* warned against. See *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480 (1957).

Section 2, Eleventh (c) provides as follows (brackets supplied):

> ["The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied,* as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one

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[* nothing requires this alternative to be expressed in the written contract.]

of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services]; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership; *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

It is the absence of the language in brackets in the union shop agreement on the Erie Lackawanna Railroad which produces this controversy.

In order that the Court will not be misled, the omission from the written documents entered into between the Erie Lackawanna and the Brotherhood was meaningful and not an oversight by the parties. The critical question I propose to answer is why the parties omitted the provision

from their written contract. The short answer is that there was in existence no practical or realistic reason for including such a provision for alternative union membership in the written contract since the Brotherhood of Railroad Trainmen now holds, and always has held, all of the collective bargaining agreements for all "Train Service" employees on the Erie Lackawanna Railroad. Under these circumstances, there is no situation which could arise on the Erie Lackawanna Railroad in which alternative union membership could be authorized or proper as I view the legislation and its purpose.

In order to fully understand the significance of the foregoing statement, it is necessary to examine the legislative history to determine the purpose behind permitting the variation on the authorization of strict union shop membership for employees in the operating crafts of the railroad industry. In examining the legislative history in this regard, it is necessary to bear in mind that the question is one of alternatives, and that these alternatives are as follows:

1. Did Congress intend to dilute the effectiveness of the union shop provision for the operating crafts by authorizing enclaves of minority unions to actively compete for the loyalty and support of the duly authorized collective bargaining representative—thereby practically liquidating all of the salutary advantages of the union shop requirement?; or

2. Did Congress intend merely to avoid compulsory dual unionism on those railroads where more than one operating union was the duly authorized collective bargaining representative and in precisely those

> situations where the requirements of intercraft mobility would make it necessary for an employee to occasionally and temporarily change from one operating craft to another operating craft?

I firmly believe that Congress intended the second alternative and that when the Act speaks of alternative union membership the alternative union must be one which is not only national in scope and organized in accordance with the Railway Labor Act, but ALSO A UNION WHICH IS A DULY AUTHORIZED REPRESENTATIVE FOR SOME CLASS OR CRAFT OF EMPLOYEES ON THE PARTICULAR RAILROAD INVOLVED. Indeed, as Congressman McGuire explained to his colleagues (p. 17058):

> "The bill now before the House, S. 3295, is substantially identical to the bill reported by our Committee, the only difference being language agreed to by the railway labor organizations themselves, for the purpose of clarifying the section dealing with union membership requirements, where employees hold rights in more than one class or craft, *and where different organizations hold the bargaining rights in such crafts or classes.*" (Emphasis added)

So that the legislative history may not be analyzed in a vacuum but can be understood in terms of the situation which prevails in the present case, there are approximately 65 Eastern railroads in the United States.[29] Each of these railroads has collective bargaining agreements with operating craft unions. The plaintiff, Switchmen's Union of North

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[29] Railroads represented by the Eastern Carriers Conference Committee.

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America, has contracts representing a craft on only 2 of these Eastern railroads, to wit: the Buffalo Creek Railroad [5.66 miles] and the Indianapolis Union Ry. Co. [15.88 miles].[30] These are 2 short lines, and the number of employees represented by the Switchmen's Union on these 2 railroads is a fractional percentage of "Train Service" employees on the Eastern railroads.

The question is, did Congress intend that the Switchmen's Union, simply because it is organized under the Railway Labor Act and is national in scope, could charge and collect cut-rate dues and thereby satisfy union shop requirements for operating employees on the remaining 63 railroads with whom it has no official or contractual basis? There is nothing in the legislative history to support the theory that Congress intended to confer this kind of a lucrative franchise on any of the operating unions. The purpose of the legislation throughout appears to have been moral and rational rather than immoral and nonsensical.

Furthermore, as the legislative history is reviewed it becomes quite evident that the draftsmen believed it an unnecessary redundancy to declare in Section 2, Eleventh (c) that in order to qualify for alternative union membership a third unexpressed qualification was necessary, to wit: that the alternative union be one duly certified by the National Mediation Board to represent a class or craft of employees in bargaining with the particular employing carrier.

From the inception of the legislative history the Bills which were introduced authorized a straight union shop contract and there was nothing therein contained which would permit an employee to satisfy the union shop re-

[30] Deposition of Switchmen's Union by Neil Speirs, p. 9.

quirement by belonging to any union other than his duly authorized collective bargaining agent. These Bills were supported by 21 of the 23 standard railway labor organizations. The only two who did not support the legislation in its original form were the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Engineers [House Hearings, p. 6.]

The bulk of the testimony, except for opposition by management representatives to the principle of the legislation, was directed toward discussion of the "safeguard" provision against union discrimination and toward improving the language. The concern was to make certain that all contingencies were protected against, and that all groups of employees were adequately protected from the discriminatory language contained in the constitutions of some of the Brotherhoods and the discriminatory practices of which some of the Brotherhoods were accused. It was as a result of these hearings that the absolute "safeguard" heretofore referred to was redrafted, permitting members of the Switchmen's Union and the O.R.C. & B. to maintain their membership in any union without fear of economic reprisal by the Brotherhood and regardless of any prohibitive constitutional provision as referred to in the complaint of the plaintiffs herein.

It was the Brotherhood of Railroad Trainmen who called the attention of Congress to the possibility of compulsory dual unionism, in the context of a situation of job mobility peculiar to the railroad industry, which might result from the straight union shop provision [House Hearings, p. 29; Senate Hearings, p. 65]. The problem that was raised was perhaps best described by Mr. Justice Harlan in his opinion

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in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480. 77 S. Ct. 421. He said (p. 490):

> "Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be *temporarily* promoted to engineer *for a short time*, or a conductor might have to serve *temporarily* as brakeman. Under the ordinary union-shop contract, such a change from craft to craft, even though *temporary*, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. • • •
>
> So Congress faced the problem of reconciling the union shop with some protection to employees who shifted from one craft to another one represented by *a different labor organization under a union-shop contract.* The solution, of course, was evident: to provide that if a fireman, for example, is *temporarily* promoted to engineer, he can satisfy the union-shop contract of the engineers although still remaining a member of the union representing the firemen. • • • "[11]

When the problem that was first noted by the Brotherhood of Railroad Trainmen was called to the attention of Mr. Harrison by Congressman Hinshaw, he pointed out (p. 78) that the intention of the 21 organizations had been originally to permit the unions to negotiate about that question with railway management. But, he said:

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[11] All italics in quotations hereinafter are supplied by me for emphasis.

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"I think on that, we could get together with the trainmen on some workable reasonable plan, and we will be glad to try to do that, and give the committee the benefit of our labors. I think it is a *practical* question and as reasonable men we ought to be able to work it out."

Later on Mr. Harrison returned to the hearings and testified with respect to his progress on the problem that the Brotherhood had raised. He said (pp. 259, 260):

"• • • we had a meeting of the so-called union heads in Washington on Wednesday and Thursday of this week to try to get them together on a solution of the problem that Congressman Hinshaw calls to our attention, and while they made considerable progress they have not as yet reached a definite conclusion. I think, however, that we will find an answer to that problem, and we will give it to the committee.

Now, let me make it clear that we have no intention whatever of forcing any employee to belong to two different unions just because he *temporarily*, because of fluctuations in business, moves from *one labor agreement to another labor agreement* in the exercise of his seniority rights. Let me make that clear in the record, so there will not be any question about it if you approve this bill."

Apparently no agreement was reached among the operating unions, and on August 7, 1950 the Committee on Interstate and Foreign Commerce reported the Bill favorably to the House of Representatives (Report No. 2811, 81st Cong.

2d Sess.) as a straight union shop authorization. The Report stated (p. 5):

> "Subparagraph (a) authorizes agreements requiring as a condition of employment, that employees be members of the 'labor organization representing their craft or class'. During committee consideration of the bill questions were raised as to the status of employees who are *temporarily* promoted or demoted from one closely related craft or class to another. While, under the authority granted by the bill, no single agreement could require membership in more than one union it was contended that as a practical matter this result might follow from two or more agreements between carriers and labor organizations, and furthermore, that some employees might, in order to retain certain union benefits, feel obliged to be members of more than one union. The committee decided that these questions should be resolved by negotiation and collective bargaining."

Similarly, the Report to the Senate (Report No. 2262, 81st Cong. 2d Sess.) provided for a straight union shop authorization. That Report made no reference whatever to the problem of intercraft mobility, thereby apparently adopting the same view as the House, viz.: that the problem could be resolved by contract. It is significant, as bearing on the intent of Congress to have the union shop applicable to the railroad industry, that the only reservation in the Report was expressed in the following language:

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"SUPPLEMENTAL VIEWS OF SENATORS TAFT, SMITH OF NEW JERSEY, AND DONNELL.

We reserve the right to introduce and support on the floor any and all amendments, including amendments which would cause the union shop and check-off conditions of employees of industry covered by the Railway Labor Act to be in general accord with the union shop and check-off conditions of employees of other industry."

Senator Lister Hill, who was a member of the Committee on Labor and Public Welfare, was the spokesman for the Bill on the floor of the Senate. On September 23, 1950, in legislative session, the Senate resumed consideration of S.3295 (96 Cong. Rec. 15737). Senator Hill explained that the Bill was "intended to extend to employees and employers subject to the Railway Labor Act, the right, now possessed by employees and employers in industry generally, to bargain collectively with respect to the union shop and check-off." Senator Hill then referred to the reservation by Senators Taft, Donnell and Smith and said:

"Since the report of the bill by unanimous action of the committee, these amendments have been worked out, they have been agreed upon, and on behalf of the senior Senator from Ohio and myself, I have offered the amendments."

So far as is pertinent here the amendment to the union shop authorization proposal thus offered read as follows (96 Cong. Rec. 15737):

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"Provided, further, that no such agreement shall require membership in more than one labor organization."

In explaining this particular amendment Senator Hill said (p. 15736):

"This proviso was attached because some question was raised as to the status, under this bill, of employees who are *temporarily* promoted or demoted from one closely related craft or class to another. This practice, with minor exceptions, occurs only among the train-engine-service employees. Thus a fireman may be promoted to a position as engineer *for a short time* and then due to a reduction in force be returned to his former position as fireman. It is the intention of this proviso to assure that in the case of such promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located *if he retains his membership in the union representing the craft or class from which he has been transferred.*"

No action was taken on this proposed amendment. However, on December 7, 1950 (96 Cong. Rec. 16268) the present language contained in Section 2, Eleventh (c), providing that the requirement of membership under a union shop contract is satisfied if the employee belongs to any one of the labor organizations national in scope organized in accordance with the Railway Labor Act, was offered.

These amendments were the amendments that had been promised by Mr. Harrison in his earlier testimony. Senator Hill said (16268):

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"Mr. President, these amendments are the amendments agreed upon by the railroad brotherhoods. They are the amendments to which I alluded earlier. With their adoption the railroad brotherhoods urge the passage of the bill.

The amendments do nothing more nor less than what the committee desires to do, and what was the intent of the committee in offering its amendment, that no employee of a railroad should be required to belong to more than one labor organization. The only difference between the committee amendment and the amendments now before the Senate, which have been agreed upon by all the railroad organizations, is that the amendments now before the Senate spell out in much more detail the purposes of the committee amendment than did the committee amendment. *But the intent and the purpose of the committee amendments and the amendments now before the Senate are exactly the same.*"

The amendments were then agreed to, whereupon Senator Hill, upon request, explained the extent to which the amendments constituted a variance from the Taft-Hartley Law provisions, and he said (16268):

"What the amendments do is simply to spell out the one proposition that no employee of a railroad shall be required to belong to more than one union. The Senator realizes that in an operating union a man may be a brakeman today and may be promoted to a conductor tomorrow, and he may be a conductor for *30, 60 or 90 days,* and then he may be dropped back to be a brakeman again. He might be a fireman to-

day; but tomorrow he might be promoted to be an engineer. He might then serve for *90 days or 120 days* as an engineer, and then he might be demoted to fireman. In the railroad industry there is a peculiar situation which perhaps does not exist in any other industry. The only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union."

Following this explanation, questioning ensued. Senators wanted to make sure that the union shop was preserved, and Senator Wherry specifically inquired, after referring to the amendment (16328):

"I have read that amendment as a premise to my question, which is as follows: If this measure is enacted, will it give to employers and employees the right, by means of collective bargaining, to set up a union-shop agreement?"

To this question Senator Holland replied in the affirmative. And to emphasize the point Senator Wherry pursued:

"If that is done, will there be a mandatory provision that a person who today might not be a member of such an organization, will be forced into one union organization?"

Senator Holland stated:

"All I can state is my personal understanding, which is that such a person will be forced into the organization which at that time represents that particular class or craft of employees."

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Senator Holland then yielded to Senator Hill, who confirmed Senator Holland as follows:

> "Mr. President, I would say that if the bargaining unit representing a particular employee arrived at an agreement with management, under which in that particular craft there was to be a union shop, the employee would be required to join the union."

Later, Senator Hill explained that by virtue of the amendment the employee was also free, should he so desire, to change organizations from one to the other and then back again if he desired to do so at the time that his craft changed (p. 16329). But, he said, *"He would have to belong to one or the other of those two organizations"* [meaning one of the organizations representing a craft involved in the shuttling operation].

Further debate made it clear that the proposed amendment was satisfactory to the Brotherhood of Railroad Trainmen and that the only organization not supporting the legislation was the Brotherhood of Locomotive Engineers.

I fail to find any suggestion in the legislative history that by defining the alternative union which could satisfy the requirement of union shop membership to mean unions that were national in scope and organized under the Railway Labor Act, Congress thereby intended to confer the extraordinary special benefit of dues-siphoning on these five unions, which follows from the interpretation placed on the legislation by Judge Herlands and by the plaintiffs in this action. To repeat, the sole purpose of permitting alternative union membership was narrow, specific and practical, to wit: to avoid the necessity of compulsory dual

membership where employes shuttled back and forth from crafts represented by different collective bargaining agents on a particular railroad.

In the light of the clear purpose of that legislative history there was no need for the Erie Lackawanna and the Brotherhood to incorporate in the contracts in *haec verba* the language of Section 2, Eleventh (c). The language is not statutorily mandated as is the "safeguard" provision. The practical reason was absent since no union other than the Brotherhood holds a contract with the Erie Lackawanna Railroad Company for "Train Service" employees.

Should another union at some future time be certified by the National Mediation Board as a collective bargaining agent for any of the crafts or classes now represented by the Brotherhood, then the problem of intercraft mobility would, in fact, arise and the contract would, of necessity, need to be interpreted as though the alternative union shop provision was incorporated in the agreement *in extenso,* or it could be redrawn at that time, if the parties so choose. For in the light of such a development, an employee could lawfully satisfy his union shop requirement by belonging to either of the "Train Service" unions certified as collective bargaining representatives on the Erie Lackawanna Railroad by the National Mediation Board.

Even assuming then that there is a justiciable controversy, and even if the Court does not grant defendants' motion for summary judgment upon the ground that there is no legal requirement for the contracting parties to express their full agreement in writing and that the contract is therefore entitled to the presumption of legality, I respectfully submit that the motion of the plaintiffs for

summary judgment should in any event be denied. The plaintiffs must be required to submit evidence in support of their complaint and, in fact, the defendants are entitled to prove, if need be, that they have not violated the Railway Labor Act by entering into the union shop agreement, the legality of which is herein assailed.[32]

Incorporated by reference in order to meet the evidentiary requirements of Rule 56 are the following documents:

1. Requests for Admission, dated May 23, 1967.
2. Requests for Admission, dated June 6, 1967.
3. Interrogatories, dated May 19, 1967, addressed to the Switchmen's Union.
4. Answers to Interrogatories by the Switchmen's Union, verified June 16, 1967.
5. Interrogatories, dated June 13, 1967, addressed to Order of Railway Conductors and Brakemen, answers to which have not as yet been received.
6. Transcript of the depositions of the Switchmen's Union of North America by Vincent Mastronardi, Chairman of the General Adjustment Committee of employees on the Erie Lackawanna Railroad, and transcript of deposition of Neil Speirs, President of the Switchmen's Union of North America.

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[32] Judge Herlands' opinion granting the injunction *pende lite* contemplated a further hearing and/or trial. This would militate against granting the plaintiffs' motion for summary judgment since nothing has been added to the papers before Judge Herlands. It does not impinge upon the defendants' motion for summary judgment, which is based on evidence establishing that there is no justiciable controversy and no illegality as a matter of law.

Affidavit of Arnold B. Elkind in Opposition to Plaintiffs' Motion

As one further item, the defendants have cross-claimed against the Switchmen's Union for money damages based on an alleged libel. To this the Switchmen's Union has pleaded, among other things, the arbitration provisions of the AFL-CIO constitution, to which both parties belong. Because of that plea, the Brotherhood has authorized me to consent to the entry of an order directing that the counterclaim be arbitrated in accordance with the provisions of the constitution of the AFL-CIO, and upon the entry of such an order will agree to a dismissal without prejudice of its counterclaim against the Switchmen's Union.

WHEREFORE, your deponent respectfully prays that the plaintiffs' motion for summary judgment be denied, and urges the Court to also refer to this affidavit in support of defendants' motion for summary judgment.

ARNOLD ELKIND

(Sworn to June 21, 1967)

"Annexed to the affidavit of Arnold B. Elkind in opposition to plaintiffs' motion were 12 exhibits. The exhibits numbered 1 through 11 are briefly described as follows (Exhibit 12 is printed):

Exhibit 1 contained references to a number of Notices for changes in rules, pursuant to Section 6 of the Railway Labor Act.

Exhibits 2 through 11 were copies of agreements between the Brotherhood of Railroad Trainmen and the Erie Lackawanna Railroad."

(R. 563-588)

Affidavit of Clifford D. Hawley in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CLIFFORD D. HAWLEY, being duly sworn, deposes and says:

I am an attorney-at-law, having been admitted to the Bar of the State of Florida in 1930, and am a member of the Brotherhood of Railroad Trainmen.

I have been associated with the Brotherhood of Railroad Trainmen in Cleveland, Ohio, since 1930, serving as an Assistant General Counsel. For the past 4 years the position of General Counsel has been vacant and I have been performing the duties of General Counsel.

I am familiar with the constitution of the Brotherhood of Railroad Trainmen, having advised the officers of the Brotherhood of Railroad Trainmen with respect thereto for many years.

In my capacity, any Grand Lodge proceedings that are brought to enforce expulsion of members in accordance with Section 132 of the constitution would come to my attention.

To my knowledge, no member of the Brotherhood has been expelled for having membership in another labor

organization for more than 20 years, and certainly there has been no such expulsion since prior to the adoption of the 1951 Amendment to the Railway Labor Act authorizing the union shop. This provision is simply one of these archaic provisions that are carried, like many archaic laws, and is simply not utilized in spite of the fact that we know of a substantial number of members of the Brotherhood of Railroad Trainmen who carry membership in other labor organizations, some of which compete with the Brotherhood for representation rights. Membership in other labor organizations is a matter of complete indifference to the Brotherhood as a matter of official policy.

CLIFFORD D. HAWLEY

(Sworn to June 22, 1967)

Affidavit of Cyril P. Buser in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CYRIL P. BUSER, being duly sworn, deposes and says:

I am employed by the Erie Lackawanna Railroad Company, having been originally employed by the Erie Railroad Company on September 30, 1950. I reside at 3106 Hadley Avenue, Youngstown, Ohio.

At the present time I am the Treasurer of Local Lodge 952 of the Brotherhood of Railroad Trainmen in Youngstown, Ohio.

Prior to joining the Brotherhood of Railroad Trainmen I was a member of the Switchmen's Union of North America, and in 1953 I was the Treasurer of Local Lodge No. 370 of the Switchmen's Union of North America in Youngstown, Ohio.

I am making this affidavit to indicate to the Court the method that is employed by the Switchmen's Union of North America to gain dues paying members as a result of the existing union shop agreement in effect on the Erie Lackawanna Railroad prior to the changes accomplished by the March and April 1967 agreements.

Affidavit of Cyril P. Buser in Opposition to Plaintiffs' Motion

There is always a substantial number of employees who, either wilfully or through neglect, do not join any of the unions having representational rights in the craft in which they are employed. The Brotherhood of Railroad Trainmen would, from time to time, cite employees in accordance with the union shop agreement which was then in effect. At that time membership in the Switchmen's Union of North America was a recognized alternative to membership in the Brotherhood of Railroad Trainmen. When it would come to my attention, or to the attention of the other local lodge officers of Lodge No. 370, that the Brotherhood of Railroad Trainmen had cited an employee for failing to be affiliated with the Brotherhood of Railroad Trainmen, our standard operating procedure, which was well known amongst the employees, was to cooperate with the employee thus cited by furnishing him with a bogus back-dated dues receipt.

The cited employee would not have paid any dues to the Switchmen's Union of North America, and he did not pay any money in order to obtain the official receipt from the Switchmen's Union of North America. I issued these receipts to such cited employees because it was recognized by my fellow officers and myself that this was the best possible advertising for the Switchmen's Union of North America. We knew that by issuing such a receipt we were saving a man his job and that he would, in the normal course, be eternally grateful to the Switchmen's Union of North America for this indulgence.

Specific instances of two such situations which occurred on April 13, 1953 are reflected in the exhibits annexed to my affidavit. These exhibits reflect the proceedings which occurred in the case of two employees who were cited by

the Brotherhood of Railroad Trainmen for failure to comply with the union shop agreement. The receipts handed to Mr. Ebert, the Superintendent, in each case as indicated in the transcript, were bogus receipts without consideration and of the type heretofore described, to the best of my recollection.

This procedure was thoroughly standardized. In fact, I arranged on hearing days to have a man stationed in the lobby near the elevator shaft leading to the Superintendent's office. He was armed with a punch and an official lodge seal, and a book of receipts. His instructions were to intercept employees enroute to the Superintendent's office, inquire as to the purpose for which they were going to see the Superintendent and, upon learning that it was for non-affiliation with the Brotherhood of Railroad Trainmen, he was instructed to issue appropriate receipts, punching the dates back a month or two, with variations so as to prevent the appearance of uniformity, and in that manner we were able to attract a substantial number of men into joining the Switchmen's Union of North America.

It is my understanding from conversations with other employees similarly situated to myself that this practice is a long-standing and well recognized custom on the Erie Lackawanna Railroad and that it is widespread. However, this is only hearsay and I do not have personal knowledge except based on conversations wth other employees.

At the time that I was indoctrinated with my duties as Treasurer of the lodge of the Switchmen's Union of North America, an official organizer from the International Headquarters of the Switchmen's Union discussed my responsibilities with me and indicated that the practice we were

following was desirable from the standpoint of the Switchmen's Union. The International Headquarters never asked us to account for any of the monies that would be represented by the bogus receipts that were issued.

Shortly after this experience I joined the Brotherhood of Railroad Trainmen. I was Secretary of my local lodge for 6 years and have been Treasurer for the past 7 years. My local lodge has approximately 500 members.

Local lodge officers of the Brotherhood of Railroad Trainmen, for all practical purposes, had abandoned the procedure of citing employees for failure to have a union shop affiliation with the Brotherhood. This was for the reason that we all knew that in the event such a citation should issue from the employer, the employee thus charged would have no difficulty in obtaining a paid-up receipt from the Switchmen's Union and that a citation under such circumstances would merely drive the free rider into the arms of the Switchmen's Union of North America.

CYRIL P. BUSER

(Sworn to June 22, 1967)

Exhibits Annexed to Affidavit of Cyril P. Buser

ERIE RAILROAD COMPANY

[EMBLEM]

J. R. EBERT
Superintendent
F. E. NAVIN
Asst. Superintendent

Youngstown 3, Ohio

April 16, 1963
File M U

Mr.

Youngstown, Ohio

Dear Sir:—

In connection with the hearing held in this office April 13th, 1953, concerning your failure to comply with the terms of the Union Shop Agreement between the Erie Railroad and the Brotherhood of Railroad Trainmen dated December 18, 1952.

The evidence produced by you at this hearing indicated that you have complied with Section 2 of this agreement and there will be no further action taken.

We are attaching a copy of the testimony taken at this hearing.

Yours very truly,
(Signed) J.R.Ebert

Messrs: Mr. J.C. Porter, 163 Main Street, Hornell, N. Y.
Mr. E. F. Mylott, 448 Clearmount Drive, Youngstown, Ohio

cc: Mr. C. P. Buser, 3106 Hadley Ave., Youngstown, Ohio

Exhibits Annexed to Affidavit of Cyril P. Buser

Youngstown, O. April 15, 1953

Statement of at hearing in Superintendent's Office at Youngstown 1:50 P.M. April 13, 1953.

Present: E. F. Mylott — B. of R. T.
E. E. Davison — "
Cyril Buser — S. U. of N. A.
E. Meszeros — "
J. Wysacki — "

Q. , the Erie Railroad has been notified by the Brotherhood of Railroad Trainmen that you have failed to comply with the terms of the Union Shop Agreement dated December 18, 1952, and that you have not shown any proof of affiliation with any organization in accordance with Section 2 of this agreement. Do you deny this charge?

A.—Yes

Q.—Do you have any evidence to prove that you belong to any organization?

A.—Yes

Q. Please let me see this proof.

(handed Mr. Ebert receipts.)

Statement by Mr. Ebert:

These are receipts for payment of dues for the month of March and April in the S. U. of N. A. and indicates you are a member in good standing.

I ask Mr. Mylott to examine these receipts.

Q.—Mr. Mylott, are you satisfied that these receipts are evidence that is a member of a labor organization, national in scope and in accordance with the Union Shop Agreement—effective December 18, 1952.

A.—Yes

(sgd) E. F. Mylott (sgd)
Local Chairman—B. of R. T. (Yard)

(sgd) F. E. Navin
Witness

Exhibits Annexed to Affidavit of Cyril P. Buser

ERIE RAILROAD COMPANY

[EMBLEM]

J. R. EBERT
Superintendent
F. E. NAVIN
Asst. Superintendent

Youngstown 3, Ohio

April 16, 1963
File M U

Mr.

Youngstown, Ohio

Dear Sir:—

In connection with the hearing held in this office April 13th, 1953, concerning your failure to comply with the terms of the Union Shop Agreement between the Erie Railroad and the Brotherhood of Railroad Trainmen dated December 18, 1952.

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Yours very truly,
(Signed) J.R.Ebert

Messrs: Mr. J.C. Porter, 163 Main Street, Hornell, N. Y.
Mr. E. F. Mylott, 448 Clearmount Drive, Youngstown, Ohio

cc: Mr. C. P. Buser, 3106 Hadley Ave., Youngstown, Ohio

Exhibits Annexed to Affidavit of Cyril P. Buser

Youngstown, O. April 15, 1953

Statement of at hearing in Superintendent's Office at Youngstown 11:10 A.M. April 13, 1953.

Present: E. F. Mylott — B. of R. T.
E. E. Davison — "
Cyril Buser — S. U. of N. A.
E. Meszeros — "
J. Wysacki — "

Q. , the Erie Railroad has been notified by the Brotherhood of Railroad Trainmen that you have failed to comply with the terms of the Union Shop Agreement dated December 18, 1952, and that you have not shown any proof of affiliation with any organization in accordance with Section 2 of this agreement. Do you deny this charge?

A.—Yes

Q.—Do you have any evidence to prove that you belong to any organization?

A.—Yes

Q. Please let me see this proof.

(handed Mr. Ebert receipts.)

Statement by Mr. Ebert:

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I ask Mr. Mylott to examine these receipts.

Q.—Mr. Mylott, are you satisfied that these receipts are evidence that is a member of a labor organization, national in scope and in accordance with the Union Shop Agreement—effective December 18, 1952.

A.—Yes

(sgd) E. F. Mylott (sgd)
Local Chairman—B. of R. T. (Yard)

(sgd) F. E. Navin
Witness

Affidavit of James J. O'Connor in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JAMES J. O'CONNOR, being duly sworn, deposes and says:

I am a member of the Brotherhood of Railroad Trainmen, and reside at 947 Winono Drive, Youngstown, Ohio 44511. I am an employee of the Erie Lackawanna Railroad Company, having first entered the service of the former Erie Railroad in 1926.

From 1959 to the end of March 1967 I was the Chairman of the General Grievance Committee of the Brotherhood of Railroad Trainmen for the Western District, serving as the chief collective bargaining officer for the employees of the Erie Railroad up to the date of its merger into the Erie Lackawanna Railroad, and thereafter for the Erie Lackawanna Railroad.

Since January 2, 1962, there have been no "Train Service" employees, to my knowledge, who perform services for the Erie Lackawanna Railroad in any craft or class other than those which are represented by the Brotherhood of Railroad Trainmen.

Affidavit of James J. O'Connor in Opposition to Plaintiffs' Motion

The Brotherhood of Railroad Trainmen is, since January 2, 1962, the only authorized collective bargaining agent for "Train Service" employees on the Erie Lackawanna Railroad.

During my 8 years as General Chairman I maintained offices for the conduct of collective bargaining activities at 2617 Market Street, Youngstown, Ohio 44507.

During those years I was a full-time salaried employee of the General Grievance Committee and had no other duties other than my collective bargaining responsibilities for the employees on the railroad.

Assisting me in that capacity during that time was a full-time paid office secretary and member of the General Grievance Committee who were compensated for their services on a daily rate and per diem basis.

I have read the transcript of the deposition of the Switchmen's Union by Neil P. Speirs, which was taken in the U.S. District Courthouse on June 15, 1967. I have particularly looked at Exhibits A through L, which were identified at the time of taking that deposition. These are collective bargaining agreements pertaining to the rules, working conditions and rates of pay of employees of the Erie Lackawanna Railroad who are represented by the Brotherhood of Railroad Trainmen. I affirm to the Court that the exhibits thus identified are true and correct and that many were negotiated either by me or under my supervyision during the years in which I was the General Chairman as aforesaid.

There are many other similar agreements which we have negotiated, but those identified by Mr. Elkind in the Speirs deposition and in his affidavit are a fair sampling

of the types of agreements with which I was constantly involved.

At no time has the General Grievance Committee received any remuneration from the Switchmen's Union of North America or from the Order of Railway Conductors and Brakemen for any of the collective bargaining activities thus carried on by the Brotherhood of Railroad Trainmen under my supervision.

When required to do so, the members of the General Grievance Committee, and then the General Grievance Committee itself, represent any and all employees in the crafts or classes for which we are the designated collective bargaining representative, regardless of whether they are dues-paying members of the Brotherhood of Railroad Trainmen or whether they pay dues to any other organization. We do so without discrimination and are required to do so without discrimination as a matter of law.

When requested to do so, we present and prosecute time claims, claims for penalty pay, and claims for reinstatement, on behalf of all members of the crafts and classes of employees on the Erie Lackawanna Railroad which we represent, regardless of whether or not they are members of the Brotherhood of Railroad Trainmen or belong to any other union. We are required to service 100% of the craft or classes we represent without discrimination. We do not receive any remuneration from members of the Switchmen's Union or from members of the Order of Railway Conductors and Brakemen for the services which we render, or may be called upon to render, to these members, either in connection with collective bargaining activities or grievance procedures.

Affidavit of James J. O'Connor in Opposition to Plaintiffs' Motion

From time to time instances of organized criticism in the Switchmen's Union enclaves have come to my attention, and occasionally litigation is directed toward the Brotherhood of Railroad Trainen spearheaded by members of the dissident unions on the Erie Lackawanna Railroad. A specific instance occurred when, following the merger of the Erie Railroad and the Delaware, Lackawanna & Western Railroad, we negotiated an agreement which we believed fairly and equitably divided work opportunities between former employees of the D.L. & W. and former employees of the Erie. The Switchmen's Union seized on this agreement to spread dissension amongst the employees and commenced litigation in the U.S. District Court in the Northern District of New York and in the U.S. District Court of New Jersey. A fair description of that litigation and the analysis of the Court with respect thereto is set forth in the opinion of Judge Coolahan which is annexed to the affidavit of Arnold B. Elkind, sworn to the 21st day of June, 1967, as Exhibit 12.

As a further illustration of the type of organized criticism engaged in by the Switchmen's Union, the Court is referred to the exhibits annexed to the Answer of the Brotherhood of Railroad Trainmen which was filed in this proceeding, in support of its counterclaim for libel.

As another illustration, in or about November of 1966, the Order of Railway Conductors and Brakemen falsely accused me of being poised to execute a particular agreement pertaining to interdivisional service of freight operations. This was a complete fabrication which, if true, would have been unpopular. No such agreement had in fact been created, but the turmoil stirred up by the accusations circulated by the Order of Railway Conductors

and Brakemen impaired my ability to negotiate a proper and appropriate agreement on this subject with management. Furthermore, such accusations tend to hold the duly constituted officers of the Brotherhood up to revilement by the membership and create feelings of insecurity and dissatisfaction on the part of the employees.

During the years that I was the General Chairman there were many claims which I presented to the top level in management, and thereafter to either the National Railroad Adjustment Board or to Special Boards of Adjustment, which I felt were lacking in merit. I was required to do so because I knew that both the Order of Railway Conductors and Brakemen and the Switchmen's Union were presenting comparable claims on behalf of employees and that if I were to execute my personal judgment with respect to these claims the reaction of the membership would be adverse to the Brotherhood of Railroad Trainmen.

Much of the time of members of the General Grievance Committee, and even of my own time, was necessarily consumed in combating untruthful propaganda directed toward the capability and effectiveness of Brotherhood representation on the Erie Lackawanna Railroad. As specific illustrations, an agreement on crew consists was worked out by the President of the Brotherhood of Railroad Trainmen which preserved many jobs on the Erie Lackawanna Railroad which would otherwise have been lost. The effect of this agreement was totally distorted and misrepresented by the dissident unions, and as a result it became necessary for face to face communication to be accomplished with a substantial number of the employees of the Erie

Lackawanna Railroad who are represented by the Brotherhood (over 3000).

Another instance of the same type of false representation regarding Brotherhood accomplishments came about as a result of a Health and Welfare agreement which was negotiated by the Brotherhood of Railroad Trainmen on a national level. The provisions of this agreement were viciously attacked by the dissident unions as inadequate and a sellout to management, and again the energies, time and money of the Brotherhood had to be dissipated in an effort to counteract the morale-shattering effect of these accusations.

The last 5% wage increase which was negotiated by the Brotherhood of Railroad Trainmen was similarly attacked on an organized basis by the dissident unions, together with the "Monday morning quarterback" descriptions of how much better they would have done had they been handling the matter for the employees.

I have read the affidavit of Arnold B. Elkind, sworn to the 21st day of June, 1967, in which he describes the collective bargaining situation on the Erie Lackawanna Railroad. The statements which he made with reference to that subject are true to the best of my knowledge, information and belief, and I subscribe to his description with the same force and effect as though it were set forth in my affidavit.

As a result of observing the turmoil and conflicting leadership that I have described, it became my firm belief and opinion after 8 years as General Chairman, that the activities of the dissident union organizations made it virtually impossible for the average employee to understand either the nature of the agreements that had been

worked out in order to improve his wages and working conditions, or the part that the Brotherhood of Railroad Trainmen had played in accomplishing those improvements. The morale of the employees can honestly be described as confused and disheartened.

I believe that effective and progressive collective bargaining on the Erie Lackawanna Railroad cannot be accomplished so long as there are enclaves of organized minority dissident unions to contend with. The fact of the matter is that my authority to negotiate came from less than 100% of the Train Service employees, whereas 100% of the Train Service employees were affected by the results of my work and this system, in my opinion, is inherently defective.

J. J. O'Connor

(Sworn to June 21, 1967.)

Affidavit of Griffith Davis in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

GRIFFITH DAVIS, being duly sworn, deposes and says:

I am the Chairman of the General Committee of the Brotherhood of Railroad Trainmen, Erie Lackawanna Railroad, Eastern District. I reside at 1019 Acker Avenue, Scranton, Pennsylvania. I have been employed by the Erie Lackawanna Railroad and maintain my seniority on that road, but since my election as General Chairman for the employees on the Eastern District in January, 1967, I have devoted, and will continue during my term of office to devote, all of my time to the representation of the employees on the Eastern District who are represented by the Brotherhood of Railroad Trainmen. My sole compensation comes from the Brotherhood of Railroad Trainmen. The office of the General Committee is located at 723 South Main Avenue, Scranton, Pennsylvania, and is staffed by a full time secretary and is serviced by the other members comprising the General Committee. The other members of the General Committee are compensated

for their services on a daily basis plus a per diem allowance.

Assisting me in my work as the chief collective bargaining officer on the Erie Lackawanna, Eastern District, for the crafts and classes represented by the Brotherhood of Railroad Trainmen are 13 Local Chairmen constituting the General Committee, of whom two are serving in the capacity of Vice Chairman and Secretary.

I am actively engaged in progressing various notices served under Section 6 of the Railway Labor Act leading toward improvements in rules, working conditions and money increment, and a number of such changes have been accomplished since my election as General Chairman. In addition, I supervise the representational activities of the various Local Chairmen and serve as the final advocate on the Erie Lackawanna property for unresolved grievances, time claims, investigations, and reinstatement applications.

I am named as a defendant in the above entitled action. I was not served with any process and have not heretofore appeared in this action.

As the chief collective bargaining officer for the Brotherhood of Railroad Trainmen for the Eastern District, I executed the "union shop" agreement of March 14, 1967 with the Erie Lackawanna Railroad, the intent of which is the subject matter of this lawsuit. I affirm that both the representatives of the Erie Lackawanna Railroad and myself were completely familiar with the language and purposes of the Railway Labor Act, and particularly with the provisions thereof authorizing union shop agreements. I know that it was my purpose, and I believe that it was

the purpose of my counterpart on the Erie Lackawanna Railroad, to have an agreement that was in strict conformity with all of the applicable terms and conditions of the Railway Labor Act.

We did not include any provision whereby membership in the union shop could be satisfied by paying dues to any alternative union. This provision was left out because the statute does not require such a statement to be included, and also for the reason that there is no other union designated by the National Mediation Board to represent Train Service employees on the Erie Lackawanna Railroad. Hence, there is no problem, and can be no problem, arising on the Erie Lackawanna Railroad which would require an employee to belong to any union other than the Brotherhood of Railroad Trainmen, regardless of what craft or class of Train Service he might be engaged in.

I have read the affidavit of Arnold B. Elkind, sworn to the 21st day of June, 1967. I believe that the description of the collective bargaining situation on the Erie Lackawanna Railroad as set forth by Mr. Elkind to be truthful and accurate, based on my knowledge.

I have also read the affidavit of James J. O'Connor, sworn to the 21st day of June, 1967, in which he describes various experiences which occurred during his 8 years of experience as a General Chairman on the Western District of the Erie Lackawanna Railroad.

I have been an employee on the Erie Lackawanna Railroad for 24 years and have been actively interested in union and collective bargaining activities for 15 years. I share the conclusion of Mr. O'Connor to the effect that the existence of minority enclaves of organized dissident

union members paying dues to a competing union, impedes viable and realistic collective bargaining, and that it produces an artificial volume of claims and grievances, with the net result that the employees are confused, dissatisfied and demoralized.

GRIFFITH DAVIS

(Sworn to June 21, 1967.)

Affidavit of Garold Roberts in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

GAROLD ROBERTS, being duly sworn, deposes and says:

I am the Chairman of the General Committee of the Brotherhood of Railroad Trainmen, Erie Lackawanna Railroad, Western District. I reside at 1366 Lusch Road, Marion, Ohio. I am also an employee of the Erie Lackawanna Railroad, but since my election as General Chairman for the employees on the Western District in March, 1967, I have devoted, and will continue during my term of office to devote, all of my time to the representation of the employees on the Western District who are represented by the Brotherhood of Railroad Trainmen.

My sole compensation comes from the Brotherhood of Railroad Trainmen. The office of the General Committee is located at 515 East Center Street, Marion, Ohio, and is staffed by a full time secretary and is serviced by the other members comprising the General Committee. The other members of the General Committee are compensated for their services on a daily basis plus a per diem allowance.

Affidavit of Garold Roberts in Opposition to Plaintiffs' Motion

Assisting me in my work as the chief collective bargaining officer on the Erie Lackawanna Railroad, Western District, for the crafts and classes represented by the Brotherhood of Railroad Trainment, are 28 Local Chairmen constituting the General Committee, of whom 2 are serving in the capacity of Vice Chairman and Secretary.

Annexed to the affidavit of Arnold B. Elkind as Exhibit 10 is a document which represents the current status of various Section 6 Notices which I am now processing with management in order to accomplish improvements in working rules and conditions. These will give the Court a concept of the nature of my collective bargaining responsibilities.

I have read both the affidavit of James J. O'Connor, sworn to the 21st day of June, 1967, and the affidavit of Arnold B. Elkind, sworn to the 21st day of June, 1967.

I agree with the opinions expressed by Mr. O'Connor, which are based on his 8 years of experience as my predecessor General Chairman, regarding the morale of the employees of the Erie Lackawanna Railroad and the complaints of employees, their dissatisfaction, and their confusion.

I believe that Mr. Elkind's affidavit fairly and accurately sets forth a description of the collective bargaining situation that prevails on the Erie Lackawanna Railroad.

I was a party signatory to the "Union Shop Agreement" which was executed on April 4, 1967 with the Erie Lackawanna Railroad. Both the representative of the Erie Lackawanna and myself were familiar with the language and purposes of the Railway Labor Act, and particularly the provisions thereof authorizing union shop agreements;

Affidavit of Garold Roberts in Opposition to Plaintiffs' Motion

we fully intended our agreement to be in conformity with all of the applicable terms and conditions thereof. We did not include any provision for alternative union membership in said agreement because the statute does not require such a statement to be included, and because there is no other union designated by the National Mediation Board to represent Train Service employees on the Erie Lackawanna Railroad. Hence, there is no problem requiring an employee to belong to any union other than the Brotherhood of Railroad Trainmen, regardless of what craft or class of Train Service he may be engaged in.

GAROLD ROBERTS

(Sworn to June 21, 1967.)

Affidavit of Paul W. Murphy in Opposition to Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF OHIO,
COUNTY OF CUYAHOGA, *ss.*:

PAUL W. MURPHY, being duly sworn, deposes and says:

I am a full-time employee of the Brotherhood of Railroad Trainmen, one of the defendants above named. My position is General Auditor and I am fully acquainted with the financial records and accounts of the Brotherhood of Railroad Trainmen. Such records are under my supervision and direction.

I have been requested to furnish certain information concerning the disbursements of the Brotherhood of Railroad Trainmen for the calendar year 1966 as reflected by said records.

During that year the Brotherhood disbursed $54,820.00 to the Railway Labor Executives Association.

The Brotherhood disbursed $78,996.89 for the salaries and expenses of its National Legislative Office in Washington, D. C.

The Brotherhood disbursed a total of $583,295.41 for the expenses and salaries of the various Legislative Boards and Legislative Representatives in the various states

served by the various railroads belonging to the Eastern Carriers' Conference Committee.

These figures are accurate to the best of my information and belief.

PAUL W. MURPHY

(Sworn to June 21, 1967.)

(R. 560-562)

Affidavit of Raymond H. Branda in Opposition to Motion of Plaintiffs for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

RAYMOND H. BRANDA, being duly sworn deposes and says:

1. I am the attorney for the defendant Erie Lackawanna Railroad Company in the above entitled matter and I make this affidavit in opposition to the motion of plaintiffs for an order granting summary judgment therein. I am fully familiar with all the pleadings and proceedings heretofore had herein.

2. It is respectfully pointed out to the Court that pursuant to the terms of an election conducted by the National Mediation Board, the defendant Brotherhood of Railroad Trainmen was duly elected as a certified bargaining agent representing the plaintiff unions as well as the defendant Brotherhood of Railroad Trainmen. In accordance with the statutory provisions applicable therefore, the defendant Erie Lackawanna Railroad Company, has entered into no contracts with the plaintiff Switchmen's Union of North America or the plaintiff Order of Railway Conductors and Brakemen.

Affidavit of Raymond H. Branda in Opposition to Motion of Plaintiffs for Summary Judgment

3. It is the opinion of the defendant, Erie Lackawanna Railroad Company, that the principle of the union shop is a salutary principle for railway carriers because ordinarily grievance procedures become a battleground for rival unions; the certified bargaining agent, in this case, the Brotherhood of Railroad Trainmen, cannot enforce disciplinary measures on its membership for the obvious reason that such a disciplined employee would resign the certified bargaining agent and join a rival union, thus lessening the effect and rendering meaningless such disciplinary provisions as is included in a collective bargaining agreement.

4. These principles are inherent and necessary to the orderly procedures established by the idea of a union shop. In this connection, a certain amount of ambivalence is required of the management as the Brotherhood of Railroad Trainmen, while they may be representatives today, may be unseated as bargaining agents on some future day. It should be made clear to the Court that it is the principle that is supported and not the identity of any particular union. The important thing is that whatever union is so certified be allowed to discharge its duties without the restraint of harassment by the unsuccessful unions.

5. Among these considerations would be the necessity for the certified union, in this case, the Brotherhood of Railroad Trainmen, to consider the reactions of any steps taken on behalf of the membership. Another consideration is the impaired morale of employees; the additional and unnecessary dimensions added to the handling of safety problems.

Affidavit of Raymond H. Branda in Opposition to Motion of Plaintiffs for Summary Judgment

6. Of paramount importance, of course, is the undesirability of undermining the confidence of the traveling public with instances of demonstrating unrest due to the actions of minority enclaves on the property carrying out a form of gorilla warfare, coaching from the sidelines, carping criticism and visible demonstrations of unrest that would do little, if any, to promote the welfare of a majority, and particular, the welfare of the public which uses the facilities.

WHEREFORE, it is respectfully requested that the motion made by the plaintiffs for summary judgment be denied.

RAYMOND H. BRANDA

(Sworn to June 26, 1967.)

Notice of Motion for Summary Judgment by Defendants Brotherhood of Railroad Trainmen and W. J. Weil

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ARNOLD B. ELKIND, sworn to the 21st day of June, 1967, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Motion Part thereof, to be held at Room 506 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 5th day of July, 1967, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, dismissing the complaints of the plaintiffs and of the intervening plaintiffs, together with the costs and disbursements of this action, and vacating the temporary injunction entered herein dated April 27, 1967.

Dated: New York, N. Y.
June 22, 1967.

Notice of Motion for Summary Judgment by Defendants Brotherhood of Railroad Trainmen and W. J. Weil

Yours, etc.

/s/ ARNOLD B. ELKIND
Arnold B. Elkind
Attorney for Defendants,
Brotherhood of Railroad Trainmen
and W. J. Weil
122 East 42nd Street
New York, N. Y. 10017

To:

ALAN F. PERL, Esq.
Sturm and Perl
150 Broadway
New York, N. Y. 10038

and

LEE LEIBIK
RUTH WEYAND
343 South Dearborn Street
Chicago, Illinois 60604
Attorneys for Plaintiffs
and Intervenor-Plaintiffs

RAYMOND H. BRANDA, Esq.
Attorney for Defendant,
Erie Lackawanna Railroad
Company
140 Cedar Street
New York, N. Y. 10006

Affidavit of Arnold B. Elkind Read in Support of Defendants' Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 67 C 1264

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ARNOLD B. ELKIND, being duly sworn, deposes and says:

I am the attorney for the Brotherhood of Railroad Trainmen, an unincorporated association, and for W. J. Weil, sued herein individually and in behalf of all members of the Brotherhood of Railroad Trainmen. I am making this affidavit in support of the motion of these two defendants to grant summary judgment dismissing the complaints.

This action was commenced on March 31, 1967, and there has been no service effected on Griff Davis, who is designated as a defendant individually and as General Chairman of the Brotherhood of Railroad Trainmen.

There has been no cause of action set forth against W. J. Weil in his individual capacity.

It is my understanding that the Erie Lackawanna Railroad Company, the other named defendant, is also moving for summary judgment dismissing the complaints.

The prior proceedings herein are adequately described in my affidavit, sworn to the 21st day of June, 1967, which is being served and filed in opposition to the motion of the plaintiffs for summary judgment. By this reference

Affidavit of Arnold B. Elkind Read in Support of Defendants' Motion for Summary Judgment

I intend that all of the statements and allegations set forth in that affidavit be incorporated as a part of these moving papers with the same force and effect as though fully set forth herein.

This motion for summary judgment is made by the defendants whom I represent pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

The first basis upon which the motion is made is that there is no justiciable controversy. On or about May 23, 1967 the defendant, Brotherhood of Railroad Trainmen, served and filed Requests for Admission under Rule 36, addressed to all of the plaintiffs. Requests No. 2 (I) and (J) read as follows:

"2. That each of the following statements is true:

(I) That there have been no discharges by the Erie Lackawanna Railroad pursuant to the union shop agreements of March 14, 1967 (Eastern District) and April 4, 1967 (Western District).

(J) That there has been no threat made to discharge any employee purported to be covered by the union shop agreements dated March 14, 1967 and April 4, 1967, by the Erie Lackawanna Railroad Company."

I have not been served with any denials of these Requests for Admission. Under the Request and under Rule 36 the matters of which the admission was requested are deemed admitted.

The complaint in this action seeks injunctive relief on behalf of the individual plaintiffs and a declaratory judgment on behalf of the individual plaintiffs. While the

Affidavit of Arnold B. Elkind Read in Support of Defendants' Motion for Summary Judgment

Switchmen's Union of North America, AFL-CIO, an unincorporated association, is named as a plaintiff, and while the Order of Railway Conductors and Brakemen, an unincorporated association, is named as an intervening plaintiff, the complaints do not seek an injunction or declaratory relief on behalf of either of these unions. The complaints only seek money damages on behalf of these two unions. However, in its moving papers for summary judgment the attorney for the plaintiffs admitted that there had been no money damages and therefore, in effect, withdrew all pending claims asserted in the litigation on behalf of the two unions, confining the litigation field thereby to the claims of the individual plaintiffs, both original and intervening, for injunctive relief and a declaratory judgment.

In the light of the Rule 36 admissions that these plaintiffs have not been threatened with a discharge, the only remaining question is whether or not their alleged membership in the Switchmen's Union entitles them to have the union shop contract between the Brotherhood of Railroad Trainmen and the Erie Lackawanna Railroad spell out in *haec verba* that their requirement of membership shall be satisfied if they hold membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in the service in which they are employed.

The absence of this language in the agreement does not create a justiciable controversy. There is nothing in the Railway Labor Act which requires a union shop contract to carry such a provision as a matter of law.

The plaintiffs "have no right" to compel the parties to include such a provision in a collective bargaining agreement as a matter of law.

Affidavit of Arnold B. Elkind Read in Support of Defendants' Motion for Summary Judgment

By their failure to deny the Requests for Admission dated May 23, 1967, the plaintiffs have admitted the truth of the following statements:

"(A) That the brotherhood of Railroad Trainmen, at the time of the commencement of this action and for a number of years prior thereto, was the exclusive bargaining agent, duly certified as such by the National Mediation Board, for the employes in the crafts or class of conductors, ticket collectors, baggagemen, trainmen, and yard service employees working in both road and yard service for the Erie Lackawanna Railroad Company.

(B) That the Brotherhood of Railroad Trainmen and the Erie Lackawanna Railroad Company are currently parties to written collective bargaining agreements containing provisions for rates of pay, hours of work, health and welfare benefits, seniority rights, union security, and numerous other terms and conditions of employment for the employees working in yard and road service.

(C) That all employees on the Erie Lackawanna Railroad within the crafts or classes represented by the Brotherhood of Railroad Trainmen receive the benefits of said collective bargaining agreements, including the individual plaintiffs, the individual intervening plaintiffs, and those employees paying dues to the Switchmen's Union of North America and/or the Order of Railway Conductors and Brakemen.

(D) That the Switchmen's Union of North America is not now, and has not been for several years, certified by the National Mediation Board as the bargaining representaive of any employees of any class or craft on the Erie Lackawanna Railroad.

(E) That the Order of Railway Conductors and Brakemen is not now, and has not been for several years, certified by the National Mediation Board as the bargaining representaitve of any employees of any class or craft on the Erie Lackawanna Railroad.

(F) That at no time material to this proceeding, nor at the time of the commencement of this action, has either the Switchmen's Union of North America or the Order of Railway Conductors and Brakemen been recognized by the Erie Lackawanna Railroad Company as the exclusive bargaining agent for any employees of any class or craft performing services on the Erie Lackawanna Railroad.

(G) That neither at the time of the commencement of this proceeding nor at any time material, have either the Switchmen's Union of North America or the Order of Railway Conductors and Brakemen been a party to any collective bargaining agreement with the Erie Lackawanna Railroad Company.

(H) That the Brotherhood of Railroad Trainmen, as the exclusive bargaining agent of all the employees in the class or crafts which it represents

with the Erie Lackawanna Railroad Company, is under an enforceable obligation to represent all employees covered by the agreement, whether or not they are members of the Brotherhood of Railroad Trainmen.

(M) That none of the plaintiffs, or other members of the class or crafts they assert to represent in this proceeding, hold employment rights with the Erie Lackawanna Railroad in any craft or class other than those classifications which are exclusively represented on the Erie Lackawanna Railroad by the Brotherhood of Railroad Trainmen."

Since none of the plaintiffs or other members of the class or craft they assert to represent in this proceeding hold employment rights with the Erie Lackawanna Railroad in any craft or class other than those classifications which are exclusively represented on the Erie Lackawanna Railroad by the Brotherhood of Railroad Trainmen, they would not be able to avail themselves of alternative union shop membership in any event, so that the absence of the language contained in Section 2, Eleventh (c) [45 U.S.C. 152, Eleventh (c)] would under no circumstances be applicable or available to any of thes plaintiffs even if such language had been included in the collective bargaining agreement.

The second basis for this motion is that it is undisputed that the Brotherhood and the Erie Lackawanna intended to comply with all of the terms and conditions of the Railway Labor Act when they negotiated and executed the union shop agreement. Since there is no requirement for including the proviso for alternative union shop membership in the agreement, the plaintiffs must prove an intent

to violate the Act from some other source. This they have not done and cannot do.

The third and final separate basis upon which this motion for summary judgment is predicated, is that Section 2, Eleventh (c) of the Railway Labor Act was never intended by the Congress to allow alternative union shop membership in an operating union national in scope and organized under the Railway Labor Act, unless that union held collective bargaining rights or was a certified collective bargaining representative on the carrier involved. As will be shown, the legislative hearings and debate that preceded passage of the bill reveal a clear Congressional intent to limit the alternative union shop proviso to the narrow situation of intercraft mobility, where it is occasionally necessary for an employee to temporarily change from one operating craft to another.

WHEREFORE, the defendants, Brotherhood of Railroad Trainmen, Griff Davis, individually and as general Chairman of the Brotherhood of Railroad Trainmen, and W. J. Weil, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, respectfully ask that an order be entered pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, dismissing the complaints of the plaintiffs and of the intervening plaintiffs, together with the costs and disbursements of this action, and vacating the temporary injunction entered herein, dated April 27, 1967.

ARNOLD B. ELKIND

(Sworn to June 21, 1967)

Clerk's Certificate

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from A-D; and from 1 to 1924 inclusive, contain the original record certified by the Clerk of the District Court for the Southern District of New York, and the proceedings in this court, in the case of,

John P. O'Connell, et al.,

Plaintiffs-Appellees,

v.

Erie Lackawanna Railroad Company,

Defendant,

Brotherhood of Railroad Trainmen, an unincorporated association and Griff Davis, individually and as General Chairman of the Brotherhood of Railroad Trainmen, and W. J. Weil, individually and in behalf of all members of the Brotherhood of Railroad Trainmen,

Defendants-Appellants,

Wayne W. Delaney, et al.

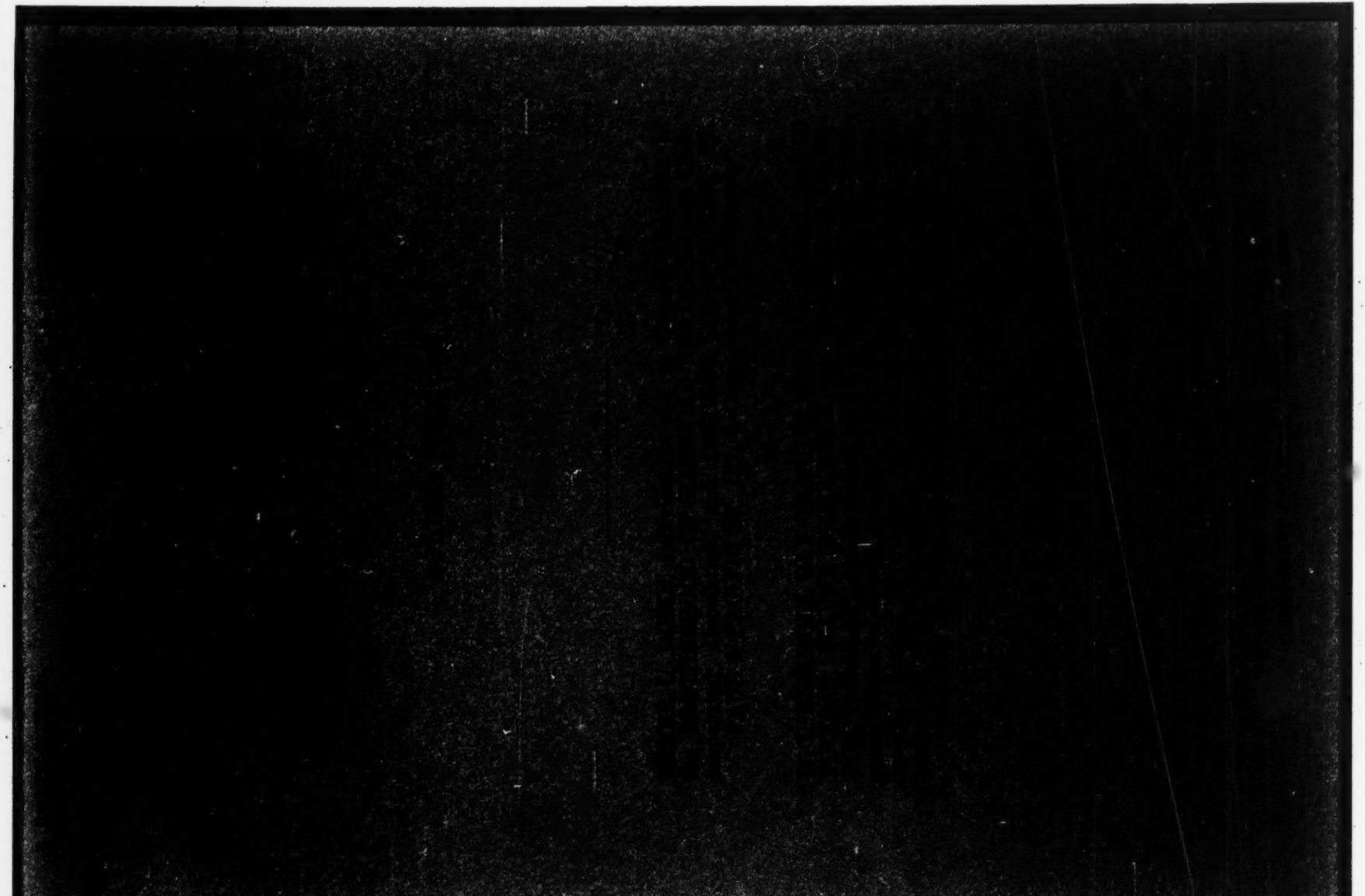
Intervenor-Plaintiffs-Appellees.

Clerk's Certificate

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York in the Second Circuit this twenty-eighth day of May in the year of our Lord one thousand nine hundred and sixty-eight of the Independence of the said United States the one hundred and ninety-second.

.....

Clerk



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 172

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation, Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an Unincorporated Association, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RELEVANT DOCKET ENTRIES.

Date	Proceedings
2-23-67	Filed complaint and 6 copies.
	• • • • • • • •
2-23-67	Issued Summons and 6 copies with 6 copies of complaint.
	• • • • • • • •
2-23-67	Motion of Plaintiffs for a Temporary Restraining Order argued and denied. Hoffman, J.
	• • • • • • • •
3- 1-67	Filed Notice and motion for a preliminary injunction by plaintiffs.
	• • • • • • • •
3-13-67	Filed summons returned served as to Chicago, Milwaukee and St. Paul and Pacific Railroad, Elmer Dirks, and Brotherhood of Railroad Trainmen (3 services).
3-15-67	Filed Verified Answer by defendant, Elmer L. Dirks.
	• • • • • • • •
3-15-67	Filed Verified Answer of defendant, Brotherhood of Railroad Trainmen.
	• • • • • • • •
3-21-67	Filed Answer of defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
	• • • • • • • •

Docket Entries

3-21-67 By Stipulation order time for defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company to answer or to otherwise plead extended to and including March 21, 1967. Lynch, J.

3-24-67 Filed Notice and Motion to dismiss the complaint as to defendants Luna, Chester and Chase.

3-24-67 On Motion of Defendants Charles Luna, L. E. Chester and W. E. B. Chase, complaint is hereby dismissed as to said defendants. Decker, J.

* * * * * * * *

4- 3-67 Re-Hearing on motion for Preliminary Injunction. Opening statements waived by the parties. Evidence heard in part for plaintiffs. Cause continued to April 4, 1967 at 10:00 A. M. for further hearing.—Hoffman, J.

4- 4-67 Further evidence heard for plaintiffs. Plaintiffs rest. The court sustains the motion of the several defendants to dismiss the complaint made at the close of the plaintiffs' evidence, and will render judgment against the plaintiffs and judgment will be on the merits. Hoffman, J.

* * * * * * * *

5 -3-67 Filed notice of motion and plaintiffs' motion for leave to file additional supporting authority and for temporary restraining order pending entry of judgment.

5- 3-67 Motion of plaintiffs for leave to file additional supporting material and for a temporary restraining order, denied. Hoffman, J.

* * * * * * * *

Docket Entries

5-24-67	Enter Findings of Fact and Conclusions of Law. Ordered that the complaint herein be and the same is hereby dismissed and that the plaintiffs do have and recover nothing from the defendants by reason of this action against said defendants; that said action be and the same is hereby dismissed on the merits and that said defendants do have and recover of and from said plaintiffs their costs in this action. Hoffman, J.
	• • • • • • • •
6- 2-67	Filed Plaintiff's Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

W. L. Birkholz, Ray Granger, Thomas Foley, David Tucibat, Wayne Blackburn and Marvin Hoisington, individually and in behalf of all members of the Switchmen's Union of North America, AFL-CIO, who are employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Switchmen's Union of North America, AFL-CIO, an unincorporated association,
Plaintiffs,

vs.

Elmer L. Dirks, individually and as General Chairman of the Brotherhood of Railroad Trainmen, an unincorporated association, Charles Luna, L. E. Chester, and W. E. B. Chase, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation,
Defendants.

Civil Action.
No. 67-C-285.

VERIFIED COMPLAINT FOR INJUNCTION, DECLARATORY JUDGMENT AND DAMAGES.

This is a complaint for injunction, declaratory judgment and damages. This Court has jurisdiction of this complaint under United States Code, Title 28, Section 1337, conferring original jurisdiction upon this Court of any

civil action or proceeding arising under any Act of Congress regulating commerce, the cause of action herein stated being one for the violation of certain of plaintiffs' rights under the Railway Labor Act, as amended, 45 U. S. C. 151, et seq. This Court has jurisdiction to grant the declaratory judgment herein prayed pursuant to Section 2201 of the Judicial Code, United States Code, Title 28, Section 2201. The defendant, Chicago, Milwaukee, St. Paul & Pacific Company has its principal office in and operates railroad lines into and out of Chicago, Illinois, within this district. The contract which has been entered into, and which the defendants are threatening to apply, in violation of the Railway Labor Act, as hereinafter set forth, was negotiated at Chicago, Illinois, within this district.

1. The plaintiff, W. L. Birkholz, is now, and has for the past 25 years been, employed by the defendant railroad as a yard service employee. He is now, and at all times for the past 10 years has been, a member of the plaintiff Switchmen's Union.

2. The plaintiff, Ray Granger, is now, and has for the past 25 years been, employed by the defendant railroad as a yard service employee. He is now, and at all times for the past 10 years has been, a member of the plaintiff Switchmen's Union.

3. The plaintiff, Thomas Foley, is now, and has for the past 26 years been, employed by the defendant railroad as a yard service employee. He is now, and at all times for the past 10 years has been, a member of the plaintiff Switchmen's Union.

4. The plaintiff, David Tucibat, is now, and has for the past 10 years been employed by the defendant railroad as a yard service employee. He is now, and at all times here relevant has been, a member of the plaintiff Switchmen's Union.

5. The plaintiff, Wayne Blackburn, is now, and has for the past 9 years been, employed by the defendant railroad as a yard service employee. He is now, and at all times here relevant has been, a member of the plaintiff Switchmen's Union.

6. The plaintiff, Marvin Hoisington, is now and has for the past 15 years been, employed by the defendant railroad as a yard service employee. He is now, and at all times here relevant has been, a member of the plaintiff Switchmen's Union.

7. The members of the Switchmen's Union of North America, AFL-CIO, who are employed as yard service employees by the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company, exceed 500 in number and constitute a class composed of persons so numerous as to make it impossible to bring them all before the court in person. The plaintiffs, W. L. Birkholz, Ray Granger, Thomas Foley, David Tucibat, Wayne Blackburn and Marvin Hoisington are members of this class who will fairly ensure the adequate representation of all members of the class for the purposes of this suit.

8. The plaintiff Switchmen's Union of North America, AFL-CIO, is an unincorporated association and a labor organization, having its national office and headquarters at 3 Linwood Avenue, Buffalo 2, New York. The Switchmen's Union of North America is a labor organization national in scope, organized in accordance with the provisions of Section 2 of the Railway Labor Act, as amended (45 U. S. C. 152) and as such has continuously since adoption of the 1934 amendments to the Railway Labor Act (48 Stat. 926), participated in the selection and designation of the labor members of the National Railroad Adjustment Board.

9. The defendant Elmer L. Dirks is General Chairman of the General Grievance Committee of the defendant

Brotherhood of Railroad Trainmen on the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Lines East, and is here sued both individually and as such general chairman.

10. The defendants Charles Luna, L. E. Chester and W. E. B. Chase are respectively the president, assistant to the president and general-secretary and treasurer of the Brotherhood of Railroad Trainmen and are here sued both individually and as representatives of a class composed of all of the members of the Brotherhood of Railroad Trainmen. The members of the Brotherhood of Railroad Trainmen are so numerous as to make it impossible to bring them all before the court in person. The defendants Charles Luna, L. E. Chester, W. E. B. Chase and Elmer L. Dirks, as officers and members of said labor organization, will fairly ensure the adequate representation of all members for the purposes of this suit.

11. The defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company is a corporation organized and existing within the laws of the State of Wisconsin and is a carrier within the meaning of Section 1 of the Railway Labor Act, as amended (45 U. S. C. 151).

12. On November 18, 1966 the plaintiff Switchmen's Union filed a petition with the National Mediation Board, accompanied by authorization cards in the Switchmen's Union signed by 718 employees of the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in which petition the Switchmen's Union alleged that it had been designated by a majority of the employees within the craft or class of yard service employees on the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company as their representative for purposes of the Railway Labor Act and asking the National Mediation Board to so certify it, all as more fully appears from a copy of said petition marked Exhibit A attached hereto

and made a part hereof. Said petition has been docketed by the National Mediation Board as Case No. R-4895 and the National Mediation Board will, within the course of the next few months, hold an election to determine whether the yard service employees of the said railroad desire to be represented by the plaintiff Switchmen's Union or by the defendant Brotherhood of Railroad Trainmen.

13. On February 1, 1967 the defendant Brotherhood of Railroad Trainmen and the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company entered into an agreement which by its terms is in violation of Section 2, Third of the Railway Labor Act, as amended (45 U. S. C. 152, Third) in that said agreement requires all employees covered thereby as a condition of employment to become and remain members of the defendant Brotherhood of Railroad Trainmen within sixty days after the effective date of the agreement, without providing that as to all employees covered by said agreement membership in any other labor organization national in scope which admits to membership employees within the craft or class of engine, train, yard or hostlery service shall satisfy the requirement of membership as required by said agreement as is made mandatory by Section 2, Eleventh (c) of the Railway Labor Act as amended. A copy of said agreement marked Exhibit B is attached hereto and made a part hereof.

14. By the proviso clause at the end of Section 1 (b) to said agreement all employees in the yard service are required to join and maintain membership in the defendant Brotherhood of Railroad Trainmen in that the Switchmen's Union does not have any labor contract with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Lines East) and in that some of the yardmen employed by defendant railroad hold no interchangeable rights. The effect of this clause is to require all of the

plaintiffs and all of the other members of the class they represent to cease being members of the plaintiff Switchmen's Union and become members of the defendant Brotherhood of Railroad Trainmen or be discharged from their employment with defendant railroad. Section 2, Eleventh (c) of the Railway Labor Act as amended grants all yard service employees the right to belong to any labor organization national in scope which admits yard service employees to membership. By denying plaintiffs this right, said agreement violates Section 2, Third and Eleventh of the Railway Labor Act, as amended.

15. Said agreement by its terms is effective on March 1, 1967. Unless this Court enters a restraining order protecting the plaintiffs from loss of their jobs for failure to join the defendant Brotherhood of Railroad Trainmen, the plaintiffs will be denied their right under the Railway Labor Act to join and be members of the labor organization of their free choice without coercion or restraint by their employer.

16. The defendant Brotherhood of Railroad Trainmen and the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company entered into said agreement for the purpose of influencing the results of the election to be conducted by the National Mediation Board in favor of the defendant Brotherhood of Railroad Trainmen and to the disfavor of the plaintiff Switchmen's Union in violation of Section 2 of the Railway Labor Act, as amended.

17. Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their continued membership in the plaintiff Switchmen's Union, in that approximately 60 of the yard service employees in the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company are insured in the Equitable Life Assurance Society under Policy ADSD 16222 issued to them as members of the plaintiff Switchmen's Union and some

others are insured under Aetna Group Policy 7-47350, also issued to them as members of the plaintiff Switchmen's Union, all of which constitute valuable property rights which will be lost if they are required to comply with the terms of the above described agreement dated February 1, 1967, which requires them to join the defendant Brotherhood of Railroad Trainmen.

18. The defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company has threatened to discharge the plaintiffs and the members of the class they represent and each of them if they do not join and remain members of the defendant Brotherhood of Railroad Trainmen, all of which threats are in violation of Section 2 of the Railway Labor Act, as amended.

19. The requirement that the plaintiffs and the other members of the class they represent must join and maintain membership in the defendant Brotherhood of Railroad Trainmen as a condition of employment deprives said persons and each of them of the right to join and remain members of the union of their own choice in that said plaintiffs and the other members of the class they represent desire to belong only to the plaintiff Switchmen's Union and cannot afford to pay initiation fees and dues to two unions.

20. Each of the plaintiffs and each of the other members of the class they represent has seniority rights entitling him to preferential employment by the defendant railroad which constitute valuable property rights which will be lost in the event of a discharge for failure to join the defendant Brotherhood of Railroad Trainmen as required by said agreement of February 1, 1967.

21. The plaintiff Switchmen's Union of North America is a labor organization engaged in representing employees in yard service on carriers throughout the United States, and as such it and its members are protected by Section

2 of the Railway Labor Act, as amended, from acts of carriers, including the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company, which interfere with or coerce employees, including the plaintiff employees, in the exercise of their right to join and designate the Switchmen's Union as their representative.

22. The membership of the plaintiff employees in the plaintiff Switchmen's Union constitutes a valuable contract and property right of each of the plaintiffs and the conduct of each of the defendants. Brotherhood of Railroad Trainmen and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, has unlawfully interfered with such contract and property rights.

23. The conduct of the defendant Brotherhood of Railroad Trainmen and the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company has caused and threatens to cause each of the plaintiffs irreparable injury for which no remedy in damages is available.

24. The conduct of each of the defendants, Brotherhood of Railroad Trainmen and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, has caused the plaintiff Switchmen's Union of North America damages in that employees on the defendant railroad and other employees on all railroads where the Brotherhood of Railroad Trainmen hold contracts have become afraid that they will lose their jobs unless they cease being members of the Switchmen's Union and join the defendant Brotherhood of Railroad Trainmen, which has caused the plaintiff Switchmen's Union damages in the sum of One Hundred Thousand Dollars.

Wherefore, the plaintiffs pray:

1. That this Court issue a temporary restraining order pending hearing on the motion for preliminary injunction and issue a preliminary injunction pending hearing on the merits and then a permanent injunction restraining the

defendants, and each of them, and their officers, agents, servants and representatives from discharging or threatening to discharge the plaintiffs or any other employee of the defendant railroad for failure to join or maintain membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America.

2. That this Court declare that the provision of the proviso to Section 1 (b) of the agreement dated February 1, 1967 between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen violates Section 2, Eleventh (c) of the Railway Labor Act, as amended, and hence is null and void and of no effect, in that membership in the Switchmen's Union satisfies the requirement of membership in a labor organization national in scope even though the Switchmen's Union holds no labor contract with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and even though some yard service employees do not hold interchangeable rights.

3. That the Court award plaintiff Switchmen's Union of North America damages in the sum of One Hundred Thousand Dollars against the defendants, Brotherhood of Railroad Trainmen and Chicago, Milwaukee, St. Paul & Pacific Railroad Company and each of them.

4. That the Court award the plaintiffs attorney's fees, costs, expenses and such other and further relief as the case may require.

Lee Leibik,
Ruth Weyand,
343 South Dearborn Street,
Chicago, Illinois 60604,
Phone: WAbash 2-0677.

Dated this 23rd day of February, A. D., 1967 at Chicago, Illinois.

Verified Answer of Elmer L. Dirks

State of Illinois, } ss.
County of Cook. }

W. L. Birkholz being duly sworn on oath, do depose and say that I have read the foregoing and annexed complaint, that I have personal knowledge of the facts therein stated and that the same are true.

W. L. Birkholz.

(Jurat omitted in printing.)

(Exhibit A, pages 1 and 2 and Exhibit B to the Verified Complaint were admitted into evidence as Plaintiff's Exhibits Nos. 4, 5 and 9, respectively, and have not been reproduced here. They are printed *infra*, at pp. 75, 77 and 92 of this Appendix.)

In the United States District Court.

* * * * * * * *

(Title omitted in printing.)

VERIFIED ANSWER.

Now comes Elmer L. Dirks, individually and as General Chairman of the Brotherhood of Railroad Trainmen, one of the defendants named above, by his attorneys, David Leo Uelmen, Lester Asher and Michael C. Greenfield, and as and for an answer to the complaint admits, denies and alleges as follows:

1. Answering the introductory paragraph to the complaint, this answering defendant denies that the Court has jurisdiction over those parts of the complaint which refer to the election petition filed by the plaintiff union with the National Mediation Board (Complaint, Par. 12).

Further answering the introductory paragraph to the complaint, this answering defendant denies that this Court has jurisdiction over those parts of the complaint

which advance a construction of the provisions of the collective bargaining agreement (Complaint, Par. 14), because Congress has granted exclusive jurisdiction over these matters to the National Railroad Adjustment Board, *Slocum v. Delaware, Lackawanna & Western Ry. Co.*, 339 U. S. 239, and to system, group, or regional Boards of Adjustment as authorized by Public Law 89-456, §§ 1, 2, 80 Stat. 208, 209; June 20, 1966.

Further answering the introductory paragraph to the complaint, this answering defendant denies that this Court has jurisdiction to determine whether the terms of the collective bargaining agreement comply with the provisions of the Railway Labor Act, Title 45, U. S. C. A., § 151 et seq., until after the individually named employee-plaintiffs have exhausted the procedures of the contract (Complaint, Ex. "B", p. 3, Sec. 8).

Further answering the introductory paragraph to the complaint, this answering defendant denies that the collective bargaining agreement entered into on February 1, 1967, violates any provision of the Railway Labor Act or any other federal statute.

2. Answering Paragraph 1 of the complaint, this answering defendant denies knowledge or information sufficient to form a belief and therefore puts the plaintiffs to their proof with respect to the allegations contained therein.

3. Answering Paragraph 2 of the complaint, this answering defendant denies knowledge or information sufficient to form a belief and therefore puts the plaintiffs to their proof with respect to the allegations contained therein.

4. Answering Paragraph 3 of the complaint, this answering defendant denies knowledge or information suffi-

cient to form a belief and therefore puts the plaintiffs to their proof with respect to the allegations contained therein.

5. Answering Paragraph 4 of the complaint, this answering defendant denies knowledge or information sufficient to form a belief and therefore puts the plaintiffs to their proof with respect to the allegations contained therein.

6. Answering Paragraph 5 of the complaint, this answering defendant denies knowledge or information sufficient to form a belief and therefore puts the plaintiffs to their proof with respect to the allegations contained therein.

7. Answering Paragraph 6 of the complaint, this answering defendant denies knowledge or information sufficient to form a belief and therefore puts the plaintiffs to their proof with respect to the allegations contained therein.

8. Answering Paragraph 7 of the complaint, this answering defendant denies each and every allegation contained therein.

9. Answering Paragraph 8 of the complaint, this answering defendant admits the allegations contained therein.

Further answering Paragraph 8 of the complaint, this answering defendant alleges that the Switchmen's Union of North America has never been either recognized as the bargaining agent for the employees employed by the defendant railroad in the bargaining unit in issue nor has it ever been certified by the National Mediation Board to represent the employees. The Switchmen's Union of North America is a minority organization making an effort to undermine the Brotherhood of Railroad Trainmen as the

bargaining agent for the employees and has no standing to complain to this Court that employees receiving the benefits of the agreement will be compelled to help provide financial support to the defendant union. The Switchmen's Union is a stranger to the collective bargaining agreement in issue in these proceedings and has no standing to complain against any of the defendants.

10. Answering Paragraph 9 of the complaint, this answering defendant admits the allegations contained therein.

Further answering Paragraph 9 of the complaint, this answering defendant alleges that the Brotherhood of Railroad Trainmen has represented the employees in the class or craft of switchmen since 1903 or earlier and has been continuously recognized by the defendant railroad as the exclusive bargaining agent for the employees since that time. The defendant Brotherhood of Railroad Trainmen has continuously negotiated the terms and conditions of employment for the employees and is currently party to a comprehensive labor agreement containing provisions establishing wage rates, hours of work, health insurance, seniority rights, union security, and numerous other terms and conditions of employment. All individually named employee-plaintiffs are accepting the benefits of that employment contract.

11. Answering Paragraph 10 of the complaint, this answering defendant admits the allegations contained therein.

12. Answering Paragraph 11 of the complaint, this answering defendant admits the allegations contained therein.

13. Answering Paragraph 12 of the complaint, this answering defendant admits that the plaintiff union filed a

petition on November 18, 1966, requesting the National Mediation Board to hold an election among some of the employees represented by the Brotherhood of Railroad Trainmen, and that Exhibit "A", page 1 attached to the complaint is an accurate facsimile of that petition. This answering defendant denies that the information contained on Exhibit "A", page 1 is accurate or correct.

Further answering Paragraph 12 of the complaint, this answering defendant denies that the plaintiff union represents a majority of the employees within the craft or class of yard service employed on the defendant railroad.

Further answering Paragraph 12 of the complaint, this answering defendant denies any knowledge of the alleged fact that the National Mediation Board will hold an election among the employees on this railroad, and that the only knowledge which this answering defendant has concerning the plaintiff's petition, docketed as Case No. R-4895, is that the petition is on file and has been for over three months.

Further answering Paragraph 12 of the complaint, this answering defendant alleges that the National Mediation Board is not required to conduct an election upon request, but will conduct an election only if it finds that a legitimate question of representative status does in fact exist.

Further answering Paragraph 12 of the complaint, this answering defendant alleges that the enforcement of the union security provisions of the agreement is irrelevant to the issues raised in the election petition since membership in the petitioning labor organization is not required to support the petition. The petitioning union can support its election petition with written document called an "authorization card" signed by the individual employees which designates the petitioning union as their bargaining agent.

Further answering Paragraph 12 of the complaint, this answering defendant denies each and every remaining allegation contained therein.

14. Answering Paragraph 13 of the complaint, this answering defendant admits that the union security agreement originally signed between the Brotherhood of Railroad Trainmen and the defendant railroad on June 9, 1953, was modified by an agreement signed February 1, 1967, an accurate copy of which is attached to the complaint as Exhibit "B". The modified agreement was the product and result of several months of negotiations which commenced in October 1966 and which were completed on February 1, 1967. The modified agreement was sought by the defendant union because under a disputed application of the prior agreement some employees were accepting the benefits of the agreement but were not contributing to the support of the Brotherhood of Railroad Trainmen which is obligated by law to enforce its agreement for the benefit of all the employees, whether or not they hold membership in the Brotherhood.

Further answering Paragraph 13 of the complaint, this answering defendant admits that the relevant modifications of the agreement require membership in the Brotherhood of Railroad Trainmen for all employees who work exclusively in yard service. However, it permits membership in any other union holding a contract with the defendant railroad if the employee has a contract or seniority right to work in classes of service other than yard service, thus complying with the provisions and policy of the Railway Labor Act relating to intercraft mobility.

Further answering Paragraph 13 of the complaint, this answering defendant alleges that the modifications to the union security agreement were added after a careful study of the law by both parties to the contract, particularly the

relevant provisions of the Railway Labor Act, the decision of the Supreme Court of the United States in *Pennsylvania Railroad Co. v. Rychlik,* 352 U. S. 480 (1956), and the decision of the United States Court of Appeals for the Third Circuit in *Rohrer v. Conemaugh & Black Lick Railroad Co.,* 359 F. 2d 127 (1966).

Further answering Paragraph 13 of the complaint, this answering defendant denies each and every remaining allegation contained therein.

15. Answering Paragraph 14 of the complaint, this answering defendant admits that the Switchmen's Union of North America has no labor contract with the defendant railroad and it may not legally contract with the defendant railroad because the Brotherhood of Railroad Trainmen is the exclusive bargaining agent for the employees.

Further answering Paragraph 14 of the complaint, this answering defendant admits that membership in the plaintiff union alone, without holding membership in the defendant Brotherhood, will not satisfy the union security provisions of the modified agreement.

Further answering Paragraph 14 of the complaint, this answering defendant denies that the clause will require plaintiffs and others to cease being members of the Switchmen's Union since no such language appears in the agreement and such is contrary to fact.

Further answering Paragraph 14 to the complaint, this answering defendant alleges that exclusive jurisdiction to litigate the allegations relating to any construction or interpretation of the collective bargaining agreement was assigned by Congress to the National Railroad Adjustment Board.

Further answering Paragraph 14 of the complaint, this answering defendant denies each and every remaining allegation contained therein.

Verified Answer of Elmer L. Dirks

16. Answering Paragraph 15 of the complaint, this answering defendant admits that the modified union security agreement is effective March 1, 1967.

Further answering Paragraph 15 of the complaint, this answering defendant denies each and every remaining allegation contained therein.

17. Answering Paragraph 16 of the complaint, this answering defendant denies each and every allegation contained therein.

Further answering Paragraph 16 of the complaint, this answering defendant alleges that exclusive jurisdiction to determine whether conduct of the defendants affected or influenced any election result of a future election, if held, has been granted by Congress to the National Mediation Board.

18. Answering Paragraph 17 of the complaint, this answering defendant denies knowledge of any insurance benefits which depend upon membership in the Switchmen's Union of North America.

Further answering Paragraph 17 of the complaint, this answering defendant alleges that membership in the Brotherhood of Railroad Trainmen does not preclude membership in the Switchmen's Union of North America or in any other fraternal or social society.

Further answering Paragraph 17 of the complaint, this answering defendant denies each and every remaining allegation contained therein.

19. Answering Paragraph 18 of the complaint, this answering defendant denies each and every allegation contained therein.

20. Answering Paragraph 19 of the complaint, this answering defendant denies each and every allegation contained therein.

21. Answering Paragraph 20 of the complaint, this answering defendant admits that the individually named plaintiffs have seniority rights which are valuable and which have been established and protected by the contract negotiated by the Brotherhood of Railroad Trainmen pursuant to its legal obligation to represent all employees in the unit for which it is the exclusive bargaining agent.

Further answering Paragraph 20 of the complaint, this answering defendant alleges that any loss of these rights will be caused only by the failure of the individually named plaintiffs to fulfill their obligation to contribute to the support of the Brotherhood of Railroad Trainmen and will not be caused by any illegal conduct on the part of the defendants.

Further answering Paragraph 20 of the complaint, this answering defendant denies each and every remaining allegation contained therein.

22. Answering Paragraph 21 of the complaint, this answering defendant admits that the Switchmen's Union of North America is a labor organization as those words are used in the Railway Labor Act.

Further answering Paragraph 21 of the complaint, this answering defendant denies that the Switchmen's Union of North America is authorized to represent any of the employees of the defendant railroad.

Further answering Paragraph 21 of the complaint, this answering defendant admits that the Railway Labor Act prohibits a carrier from coercing its employees in their choice of bargaining agent except to the extent that the Act, as amended, permits a railroad and the authorized union to enter into an agreement whereby the employees who benefit from the contract may be required to maintain membership in the union authorized to negotiate

for the employees (Section 2, Eleventh; Title 45, USCA § 152, Eleventh).

Further answering Paragraph 21 of the complaint, this answering defendant denies that any violation of law was committed by the defendants.

23. Answering Paragraph 22 of the complaint, this answering defendant denies each and every allegation contained therein.

24. Answering Paragraph 23 of the complaint, this answering defendant denies each and every allegation contained therein.

Further answering Paragraph 23 of the complaint, this answering defendant alleges that the terms of the union security agreement complained against by the plaintiffs provides a multi-step appeal procedure under which an employee who desires to contest this obligation to join the defendant Brotherhood may ultimately have his case heard by a neutral referee selected by the employer, the union, and the employee. If these parties are unable to agree on a neutral, one is appointed by the National Mediation Board. Any employee found to have been wrongfully discharged has available an adequate and proper procedure to remedy such alleged wrong. Damages which flow from a wrongful discharge are readily ascertainable or regularly remediable through established procedures under the agreement and are not irreparable.

25. Answering Paragraph 24 of the complaint, this answering defendant denies each and every allegation contained therein.

Wherefore, this answering defendant prays that the Court deny any and all requested injunctive relief and enter an order dismissing the complaint with costs.

Dated at Chicago, Illinois, this 13th day of March, 1967.

Michael Greenfield,
228 North LaSalle Street,
Chicago, Illinois 60601,

Asher, Greenfield, Gubbins & Segall,
228 North LaSalle Street,
Chicago, Illinois 60601,

David Leo Uelmen,
211 West Wisconsin Ave.,
Milwaukee, Wisconsin 53203,

Goldberg, Previant & Uelmen,
211 West Wisconsin Ave.,
Milwaukee, Wisconsin 53203,

Attorneys for Defendant,
Elmer L. Dirks.

Milwaukee County, }
State of Wisconsin. } ss.

Elmer L. Dirks, being first duly sworn, on oath deposes and says that he is the General Chairman of the Brotherhood of Railroad Trainmen; that he makes this verification on his own behalf, and on behalf of the Brotherhood of Railroad Trainmen, being first duly authorized so to do; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the allegations contained therein stated on information and belief, and as to such allegations he believes it to be true.

Elmer L. Dirks.

(Jurat and affidavits of service omitted in printing.)

Verified Answer of Brotherhood of Railway Trainmen

IN THE UNITED STATES DISTRICT COURT.

* * * * * * * *

(Title Omitted in Printing.)

VERIFIED ANSWER.

Now comes the Brotherhood of Railroad Trainmen, an unincorporated association, by John J. Naughton, its attorney, and for Answer to the Verified Complaint for Injunction, Declaratory Judgment and Damages says:

First Defense.

1. It denies that this Court has jurisdiction of the Complaint under Section 1337, of Title 28, of the United States Code or under the Railway Labor Act as amended, or that this Court has any jurisdiction in the premises to enter any Declaratory Judgment under Section 2201, of Title 28, of the United States Code. This defendant denies that the contract complained of is in violation of the Railway Labor Act. Defendant admits that the defendant-railroad has its principal office in Chicago, Illinois within this District, and admits that the contract complained of was negotiated in Chicago, Illinois.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 through 6, inclusive, of the Complaint and therefore denies the same.

3. Answering paragraph 7, this defendant admits that some yard service employees of the defendant-railroad are members of the Switchmen's Union of North America, AFL-CIO, but is without knowledge or information sufficient to form a belief as to the number of such employees and therefore denies the allegations as to their number. Defendant further denies that said employees constitute

a class and further denies that the named plaintiffs will fairly represent the alleged class.

4. This defendant admits the allegations contained in paragraphs 8 and 9 of the Complaint.

5. Answering paragraph 10, defendant admits that defendants Luna, Chester and Chase would adequately represent the Brotherhood of Railroad Trainmen. This defendant avers that defendant Elmer L. Dirks is a General Chairman of, and a representative of the yard service employees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Lines East, and is not an officer of the international union known as the Brotherhood of Railroad Trainmen.

6. It admits the allegations contained in paragraph 11 of the Complaint.

7. Answering paragraph 12, this defendant admits that a Petition was filed by the plaintiff Switchmen's Union and was docketed by the National Mediation Board as Case No. R-4895, but is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 12 and therefore denies the same.

8. Answering paragraph 13, this defendant admits that a union shop agreement was signed on February 1, 1967 by the signatories shown on Exhibit B to the Complaint, alleges that Exhibit B speaks for itself, and denies all other allegations contained in paragraph 13 of the Complaint.

9. Answering paragraph 14, this defendant admits that plaintiff Switchmen's Union has no labor contract with defendant railroad, admits that Section 1 (b) of Exhibit B to the Complaint contains a proviso clause and admits that the effect of that clause is to require yardmen who

have no interchangeable rights to join the Brotherhood of Railroad Trainmen if the Brotherhood accepts them after they make application for membership and if they do not come within any provision of the agreement excusing such application for membership. All other allegations contained in paragraph 14 of the Complaint are denied.

10. Answering paragraph 15, this defendant admits that the said agreement is effective March 1, 1967 and denies all other allegations contained in said paragraph.

11. Answering paragraph 16, defendant denies all the allegations contained therein.

12. This defendant alleges that any insurance rights held by members of the Switchmen's Union are dependent upon their voluntary act in relinquishing their membership in the said union and not affected by the requirements of the contract set out in Exhibit B of the Complaint and denies all other allegations contained in paragraph 17.

13. Answering paragraphs 18 and 19, this defendant denies each and every allegation contained therein.

14. Answering paragraph 20, this defendant avers that it has over the years entered into agreements establishing seniority rights which are of value to the plaintiff yard service employees and that any loss of these rights would be caused by the act of the individual employee in refusing to join his collective bargaining representative.

15. This defendant admits that the plaintiff Switchmen's Union is a labor organization, denies that any provisions of Section 2 of the Railway Labor Act are here relevant or applicable and denies the remaining allegations contained in paragraph 21.

16. This defendant denies each and every allegation contained in paragraphs 22, 23 and 24.

Verified Answer of Brotherhood of Railway Trainmen

Second Defense.

The Complaint fails to state a claim upon which relief can be granted.

Third Defense.

The matters complained of involve the interpretation or application of the collective bargaining contract and under Section 3 First (i) or Section 3 Second of the Railway Labor Act, exclusive primary jurisdiction of such disputes is in the First Division of the National Railroad Adjustment Board or in a System Adjustment Board set up on the defendant railroad.

Fourth Defense.

This defendant avers that the contract complained of provides for a system of hearings and appeals, that it has never been applied in an individual case and therefore avers that plaintiffs have failed to exhaust their administrative remedies.

Wherefore, this defendant prays that this Honorable Court deny all the relief prayed for by the plaintiffs; that it dismiss the Complaint herein and that it award this defendant its costs.

John J. Naughton,
120 West Madison Street,
Chicago, Illinois 60602,
STate 2-5925,
Attorney for Defendant, Brotherhood of Railroad Trainmen, an unincorporated association.

State of Illinois, }
County of Cook. } ss.

Sam Vander Hei, being first duly sworn, on oath deposes and says that he is a Vice President of the Brotherhood of

Railroad Trainmen, an international, unincorporated labor association; that he is in charge of the Chicago office of the said Trainmen; that he has read the foregoing Answer and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes them to be true.

Sam Vander Hei.

(Jurat and affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT.

* * * * * * * * *

(Title omitted in printing.)

ANSWER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, defendant, by James P. Reedy and Thomas J. McDonnell, its attorneys, answering the Complaint of plaintiffs in the above-entitled cause:

Answering the Introductory Paragraph to the Complaint, this defendant denies the following:

> "This is a complaint for injunction, declaratory judgment and damages. This Court has jurisdiction of this complaint under United States Code, Title 28, Section 1337, conferring original jurisdiction upon this Court of any civil action or proceeding arising under any Act of Congress regulating commerce, the cause of action herein stated being one for the violation of certain of plaintiffs' rights under the Railway Labor Act, as amended, 45 U. S. C., 151, et seq. This Court has jurisdiction to grant the declaratory judgment herein prayed pursuant to Section 2201 of the Judicial Code, United States Code, Title 28, Section 2201."

Further answering the Introductory Paragraph to the Complaint, this defendant admits that it has its principal office in and operates railroad lines into and out of Chicago, Illinois, within this District.

Further answering the Introductory Paragraph to the Complaint, this defendant denies the following:

> "The contract which has been entered into, and which the defendants are threatening to apply, in violation of the Railway Labor Act, as hereinafter set forth, was negotiated at Chicago, Illinois, within this district."

1. Answering Paragraph 1 to the Complaint, this defendant admits the allegations therein contained.

2. Answering Paragraph 2 to the Complaint, this defendant admits the allegations therein contained.

3. Answering Paragraph 3 to the Complaint, this defendant admits the allegations therein contained.

4. Answering Paragraph 4 to the Complaint, this defendant admits the allegations therein contained.

5. Answering Paragraph 5 to the Complaint, this defendant admits the allegations therein contained.

6. Answering Paragraph 6 to the Complaint, this defendant admits the allegations therein contained.

7. Answering Paragraph 7 to the Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the following allegations and it, therefore, neither admits nor denies the same:

> "The members of the Switchmen's Union of North America, AFL-CIO, who are employed as yard service employees by the defendant Chicago, Milwaukee, St.

Paul & Pacific Railroad Company, exceed 500 in number and constitute a class composed of persons so numerous as to make it impossible to bring them all before the court in person. The plaintiffs, W. L. Birkholz, Ray Granger, Thomas Foley, David Tucibat, Wayne Blackbur and Marvin Hoisington are members of this class who will fairly ensure the adequate representation of all members of the class for the purposes of this suit."

8. Answering Paragraph 8, to the Complaint, this defendant admits the allegations therein contained.

9. Answering Paragraph 9 to the Complaint, this defendant alleges that said paragraph does not pertain to it and it is, therefore, unnecessary that it answer same.

10. Answering Paragraph 10 to the Complaint, this defendant alleges that said paragraph does not pertain to it and it is, therefore, unnecessary that it answer same.

11. Answering Paragraph 11 to the Complaint, this defendant admits the allegations therein contained.

12. Answering Paragraph 12 to the Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the following allegations and it, therefore, neither admits nor denies the same:

"On November 18, 1966, the plaintiff Switchmen's Union filed a petition with the National Mediation Board, accompanied by authorization cards in the Switchmen's Union signed by 718 employees of the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in which petition the Switchmen's Union alleged that it had been designated by a majority of the employees within the craft or class of yard service employee on the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company as their

representative for purposes of the Railway Labor Act and asking the National Mediation Board to so certify it, all as more fully appears from a copy of said petition marked Exhibit A attached hereto and made a part hereof. Said petition has been docketed by the National Mediation Board as Case No. R-4895 and the National Mediation Board will, within the course of the next few months, hold an election to determine whether the yard service employees of the said railroad desire to be represeented by the plaintiff Switchmen's Union or by the defendant Brotherhood of Railroad Trainmen."

13. Answering Paragraph 13 to the Complaint, this defendant admits that on February 1, 1967, the defendant Brotherhood of Railroad Trainmen and the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company entered into an agreement.

Further answering said Paragraph 13 to the Complaint, this defendant denies that said Agreement by its terms is in violation of Section 2, Third of the Railway Labor Act, as amended (45 U. S. C. 152 Third), in that said agreement requires all employees covered thereby as a condition of employment to become and remain members of the defendant Brotherhood of Railroad Trainmen within sixty days after the effective date of the agreement, without providing that as to all employees covered by said agreement membership in any other labor oragnization national in scope which admits to membership employees within the craft or class of engine, train, yard or hostlery service shall satisfy the requirement of membership as required by said agreement as is made mandatory by Section 2, Eleventh (c) of the Railway Labor Act, as amended.

14. Answering Paragraph 14 to the Complaint, this defendant denies the following:

"By the proviso clause at the end of Section 1(b) to said agreement all employees in the yard service are required to join and maintain membership in the defendant Brotherhood of Railroad Trainmen in that the Switchmen's Union does not have any labor contract with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Lines East) and in that some of the yardmen employed by defendant railroad hold no interchangeable rights. The effect of this clause is to require all of the plaintiffs and all of the other members of the class they represent to cease being members of the plaintiff Switchmen's Union and become members of the defendant Brotherhood of Railroad Trainmen or be discharged from their employment with defendant railroad. Section 2, Eleventh (c) of the Railway Labor Act as amended grants all yard service employees the right to belong to any labor organization national in scope which admits yard service employees to membership. By denying plaintiffs this right, said agreement violates Section 2, Third and Eleventh of the Railway Labor Act, as amended."

15. Asnwering Paragraph 15 to the Complaint, this defendant denies the following:

"Said agreement by its terms is effective on March 1, 1967. Unless this Court enters a restraining order protecting the plaintiffs from loss of their jobs for failure to join the defendant Brotherhood of Railroad Trainmen, the plaintiffs will be denied their right under the Railway Labor Act to join and be members of the labor organization of their free choice without coercion or restraint by their employer."

16. Answering Paragraph 16 to the Complaint, this defendant denies the following:

"The defendant Brotherhood of Railroad Trainmen and the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company entered into said agreement for the purpose of influencing the results of the election to be conducted by the National Mediation Board in favor of the defendant Brotherhood of Railroad Trainmen and to the disfavor of the plaintiff Switchmen's Union in violation of Section 2 of the Railway Labor Act, as amended."

17. Answering Paragraph 17 to the Complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the following allegations and it, therefore, neither admits nor denies the same:

"Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their continued membership in the plaintiff Switchmen's Union, in that approximately 60 of the yard service employees in the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company are insured in the Equitable Life Assurance Society under Policy ADSD 16222 isued to them as members of the plaintiff Switchmen's Union and some others are insured under Aetna Group Policy 7-47350, also issued to them as members of the plaintiff Switchmen's Union, all of which constitute valuable property rights which will be lost if they are required to comply with the terms of the above described agreement dated February 1, 1967, which requires them to join the defendant Brotherhood of Railroad Trainmen."

18. Answering Paragraph 18 to the Complaint, this defendant denies the following:

"The defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company has threatened to discharge

the plaintiffs and the members of the class they represent and each of them if they do not join and remain members of the defendant Brotherhood of Railroad Trainmen, all of which threats are in violation of Section 2 of the Railway Labor Act, as amended."

19. Answering Paragraph 19 to the Complaint, this defendant denies the following:

"The requirement that the plaintiffs and the other members of the class they represent must join and maintain membership in the defendant Brotherhood of Railroad Trainmen as a condition of employment deprives said persons and each of them of the right to join and remain members of the union of their own choice in that said plaintiffs and the other members of the class they represent desire to belong only to the plaintiff Switchmen's Union and cannot afford to pay initiation fees and dues to two unions."

20. Answering Paragraph 20 to the Complaint, this defendant denies the following:

"Each of the plaintiffs and each of the other members of the class they represent has seniority rights entitling him to preferential employment by the defendant railroad which constitute valuable property rights which will be lost in the event of a discharge for failure to join the defendant Brotherhood of Railroad Trainmen as required by said agreement of February 1, 1967."

21. Answering Paragraph 21 to the Complaint, this defendant denies the following:

"The plaintiff Switchmen's Union of North America is a labor organization engaged in representing employees in yard service on carriers throughout the United States, and as such it and its members are pro-

tected by Section 2 of the Railway Labor Act, as amended, from acts of carriers, including the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company, which interfere with or coerce employees, including the plaintiff employees, in the exercise of their right to join and designate the Switchmen's Union as their representative."

22. Answering Paragraph 22 to the Complaint, this defendant denies the following:

"The membership of the plaintiff employees in the plaintiff Switchmen's Union constitutes a valuable contract and property right of each of the plaintiffs and the conduct of each of the defendants, Brotherhood of Railroad Trainmen and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, has unlawfully interfered with such contract and property rights."

23. Answering Paragraph 23 to the Complaint, this defendant denies the following:

"The conduct of the defendant Brotherhood of Railroad Trainmen and the defendant Chicago, Milwaukee, St. Paul & Pacific Railroad Company has caused and threatens to cause each of the plaintiffs irreparable injury for which no remedy in damages is available."

24. Answering Paragraph 24 to the Complaint, this defendant denies the following:

"The conduct of each of the defendants, Brotherhood of Railroad Trainmen and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, has caused the plaintiff Switchmen's Union of North America damages in that employees on the defendant railroad and other employees on all railroads where the Brotherhood of Railroad Trainmen hold contracts have become afraid that they will lose their jobs unless they cease being

members of the Switchmen's Union and join the defendant Brotherhood of Railroad Trainmen, which has caused the plaintiff Switchmen's Union damages in the sum of One Hundred Thousand Dollars."

Further answering plaintiffs' Complaint, this defendant denies:

1. That this Court should issue a temporary restraining order pending hearing on the action for preliminary injunction and issue a preliminary injunction pending hearing on the merits and then a permanent injunction restraining the defendants, and each of them, and their officers, agents, servants and representatives from discharging or threatening to discharge the plaintiffs or any other employee of the defendant railroad for failure to join to maintain membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America.

2. That this Court should declare that the provision of the proviso to Section 1(b) of the agreement dated February 1, 1967, between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen violates Section 2, Eleventh (c) of the Railway Labor Act, as amended, and hence is null and void and of no effect, in that membership in the Switchmen's Union satisfies the requirement of membership in a labor organization national in scope even though the Switchmen's Union holds no labor contract with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and even though some yard service employees do not hold interchangeable rights.

3. That the Court should award plaintiff Switchmen's Union of North America damages in the sum of One Hundred Thousand Dollars against the defendants, Brotherhood of Railroad Trainmen and Chicago, Milwaukee, St. Paul & Pacific Railroad Company and each of them.

4. That this Court should award the plaintiffs attorney's fees, costs, expenses and such other and further relief as the case may require.

Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, a corporation,

Defendant,

By James P. Reedy,
Thomas J. McDonnell,
Its Attorneys.

James P. Reedy &
Thomas J. McDonnell,
888 Union Station Bldg.,
Chicago, Ill.,
CE 6-7600.

(Acknowledgment of service omitted in printing.)

[1*] IN THE UNITED STATES DISTRICT COURT.

* * * * * * *

(Title omitted in printing.)

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. Julius J. Hoffman, one of the judges of said court, sitting in his court room in the United States Court House at Chicago, Illinois, commencing on the 3rd day of April, A. D. 1967, at the hour of 2:00 o'clock p. m.

[2] Present:

Mr. Lee Leibik, 343 South Dearborn St., Chicago Illinois, on behalf of plaintiffs;

Mr. David Leo Uelmen, 211 West Wisconsin Avenue, Milwaukee, Wisconsin 53203; Mr. Michael Green-

* Numbers in brackets in outer edge of text indicate page numbers of transcript of record.

field and Mr. Lester Asher, 228 North LaSalle Street, Chicago, Illinois, on behalf of defendant, Elmer L. Dirks;

Mr. John J. Naughton, 120 West Madison Street, Chicago, Illinois, on behalf of defendant, Brotherhood of Railroad Trainmen;

Mr. James P. Reedy, 888 Union Station, Chicago, Illinois, on behalf of defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[3] The Clerk: 67 C 285, W. L. Birkholz et al. v. Elmer L. Dirks et al., hearing on motion for preliminary injunction. There is also hearing on Plaintiffs' objection to defendants' interrogatories.

The Court: Good afternoon, gentlemen.

* * * * * * *

[7] We will proceed first on the question of jurisdiction which has been attacked in the answer.

* * * * * * *

The Court: Now the defendants here have raised certain challenges to the court's jurisdiction. There has been no motion to dismiss made; instead, as is equally proper, the defenses are raised in the answers and also in the briefs.

Of course, where jurisdiction is attacked, the court owes an obligation to determine the matter of jurisdiction before going into any other issues. The Brotherhood has raised the jurisdictional challenge in opposition to the [8] motion for preliminary injunction as well as in its answer, and it raised it in its brief as well as in its answer, and the defendant Dirks has raised another such challenge.

It appears that this is an action wherein the plaintiffs challenge the legality of the union shop clause in a bargaining agreement entered into by the defendant Brother-

hood and the defendant Railroad. This clause requires among other things that all yardmen employed by the railroad except those holding interchangeable rights must become members of the Brotherhood of Railroad Trainmen. The individual plaintiffs are yardmen employed by the railroad and were members of the plaintiff Swithmen's Union on March 1st, 1967, when the challenged agreement became effective. They assert that a union shop clause which does not recognize their affiliation with the SUNA as satisfying the union membership requirement is invalid under the Union Security Agreements Amendment to the Railway Labor Act, 45 U. S. C., Section 152, eleventh (c).

The Brotherhood asserts that any such issue is a matter within the exclusive primary jurisdiction of the National [9] Railroad Adjustment Board, First Division, and they cite *United Railroad Operating Crafts v. Pennsylvania Railroad,* 212 F. 2d 938, a case decided by this circuit in 1954. In that case the Seventh Circuit held that the interpretation of a phrase in a labor contract was within the exclusive jurisdiction of the N. R. A. B., even though the phrase had statutory origin. The opinion, it seems to me, is quite clear on the point that the N. R. A. B.'s function was to interpret the phrase as it appeared in the labor contract and not that of interpreting the statute from which the phrase stemmed. Although it is true that the N. R. A. B. does have exclusive primary jurisdiction to interpret and apply bargaining agreements, it does not have jurisdiction to determine the validity of such contracts. *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768, 774 (1952); *Switchmen's Union of North America v. Ogden Union Railway and Depot Company,* 209 F. 2d 419, 421, Tenth Circuit, 1954.

It seems to me too plain to require discussion that the issue raised in this suit as to the validity of the contract [10] is not one which could be resolved by an interpreta-

tion of the challenged clause. Therefore, the District Court does have original jurisdiction over this issue.

The defendant Dirks asserts that the complaint alleges matters partially within the jurisdiction of the National Mediation Board. However, a resolution of the issues in this complaint will not require a determination of whether or not the SUNA represents a majority of the employees in the relevant class or craft or whether an election is to be conducted to determine this matter. Moreover, whether the railroad's yardmen are still able to select a new bargaining representative is not an issue here. It is not alleged that the union shop clause itself prohibits such activity. This jurisdictional challenge, then, cannot be recognized.

There is still the question of whether the court has jurisdiction over another aspect of the complaint, that being the allegation that the challenged union shop agreement was consummated for the purpose of influencing the [11] outcome of an allegedly imminent certification election.

The SUNA claims majority support of the railroad's yardmen and has petitioned the National Mediation Board to certify them as bargaining representatives of this service. No election for this purpose has been scheduled, but the plaintiffs allege that there will be one. Because this is a dispute between certain of the railroad's employees and their bargaining representative, this is not matter within the exclusive or primary jurisdiction of railroad administrative agencies. Instead it is, rather, a matter within the jurisdiction of the District Courts, the joinder of the defendant railroad notwithstanding. See, for example, *Rumbaugh v. Winifrede Railroad Company*, 331 F. 2d 530, 535-36, 538, Fourth Circuit, 1964. This was an opinion by Chief Judge Sobeloff.

Finally, I must observe the presence in this case of another issue which goes to the standing of the plaintiffs

to bring this action and is in that sense jurisdictional. The plaintiffs allege in their complaint that the SUNA is a union national in scope and properly designated within the terms of the Railway Labor Act. If that were [12] not the case, the plaintiffs have no standing to issue this challenge to the union shop clause for only membership as of March 1, 1967, in such a union could satisfy the membership requirements of a union shop clause, even under the plaintiffs' reading of Section 152-11th (c).

Despite the fact that the defendant railroad admits in its answer that the SUNA does qualify as a union national in scope and properly designated under the Railway Labor Act, the Brotherhood denies this in its answer. I would be inclined to suspect that this denial is not particularly well-founded. However, if it is still an issue at the trial, it will be resolved by the court.

The purpose of these remarks, gentlemen, has been to make clear the court's opinion that it does not have jurisdiction to determine this matter of whether SUNA is a properly designated union, national in scope. It is a very simple matter. Either that union has already been so recognized through the administrative procedures prescribed in Section 3 of the Railway Labor Act or it is [13] not such a union. See *Pennsylvania Railroad v. Rychlik*, 352 United States 480, 494-497, 1957.

Now I have ordered the trial on the merits here consolidated with the hearing on the application for a preliminary injunction, a procedure authorized by Rule 65 (a) (2) of the Federal Rules of Civil Procedure. The purpose of this note is to point out that no preliminary injunction is warranted in this case. Such relief is sought to prevent the defendant Brotherhood of Railroad Trainmen from seeking to enforce its union shop contract with the railroad, under which the plaintiffs and their class must join the Brotherhood or be discharged. Moreover, the plaintiffs assert that a certification election is immi-

nent and that the election will result in a majority for the Swithchmen's Union, which will then replace the Brotherhood as the bargaining agent. Thus, the plaintiffs also claim that the union shop contract is an attempt to force the yardmen to join the Brotherhood, thereby influencing the outcome of the pending election.

The reason no injunction is necessary at this time is that even if what the plaintiff says is true, the contract [14] gives the plaintiffs and their class until the end of April to join the union. There is no imminent threat of harm, then, especially because no date for the described election has been set.

* * * * * * *

[19] Mr. Naughton: For the record I would state that if there is any issue as to the national scope of the Switchmen's Union, we would stipulate they are national in scope in order to remove that from this case.

Thank you, your Honor.

The Court: All right.

* * * * * * *

[22] Thereupon the Plaintiffs, to maintain the issues in their behalf, presented the following evidence, to wit:

NEIL P. SPEIRS,

a witness called by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Leibik.

Q. Will you state your full name, please?

A. Neil P. Speirs.

[23] Q. What is your present position, Mr. Speirs?

A. President of the Switchmen's Union of North America.

Q. Where do you live, Mr. Speirs?

A. Buffalo, New York.

Q. Can you briefly relate your previous railroad experience?

A. I commenced my railroad career in 1937 with the Southern Pacific Company as a switchman.

Q. Was this shortly after your graduation from the University of Idaho?

A. Yes. After entering the railroad service, prior to 1950 I became local chairman for the Switchmen's Union at San Francisco, California, on the Southern Pacific Railroad. Later, in 1951, I was elected General Chairman for the Switchmen's Union on the Southern Pacific Railroad. In 1955 I was elected as a Vice President of the Switchmen's Union and assigned to the Western Territory. In 1959 I was elected as President of the Switchmen's Union and have served in that capacity since that date.

Q. Have you also served on various national wages [24] and rules committees involving all of the operating organizations?

A. Yes, I have served on several committees and recently, in 1960, I was assigned to represent our union and did represent our union as president in the National Rules Dispute which lasted for a period of some four years.

Q. Did that dispute involve all of the five operating organizations?

A. Yes, that was a cooperative effort on the part of the five operating brotherhoods.

Q. Mr. Speirs, is the Switchmen's Union of North America the oldest operating union affiliated with the AFL-CIO—that, the oldest railroad operating union?

A. Yes. We have been affiliated since 1906.

Q. 1906?

A. Yes.

Q. Are you also members of the Railway Labor Executives Association?

A. Yes. We are a charter member of the Railway Labor Executive Association and have held continuous membership since 1926.

[25] Q. Was the Railway Labor Executives Association formed in 1926?

A. Yes.

Q. Are all of the standard railway labor organizations members of the Railway Labor Executive Association?

A. Yes. I think there is one exception at the present time.

Q. What are the specific functions of the Railway Labor Executives Association?

A. Well, the Railway Labor Executive Association is an association of the presidents of the standard railway labor organizations. Their function is primarily that of setting policy in the railroad labor field. They determine to a great extent the legislative programs on a national basis which railway labor will follow. They handle to a large extent all matters dealing with the Interstate Commerce Commission insofar as they relate to railroad mergers, discontinuance of passenger trains and in general matters of interest to railway labor which take on national significance.

Q. Including legislation in Congress?

[26] A. Yes.

Q. Do they maintain a Washington office, Mr. Speirs?

A. Yes, we have headquarters and an office staff which is maintained in Washington, D. C.

Q. How is this organization funded?

A. It is funded on the basis of an assessment on each organization based on the per capita membership.

Q. So that the switchmen who are members of the Switchmen's Union of North America on the Milwaukee Railroad, for example, pay part of their dues to this national organization of railroad organizations?

A. That is right. They are in the per capita assessment.

Q. Are there any other cooperative efforts in which you have engaged with the other four operating organizations in the railroad industry?

A. Well, we engage as an example on national dispute committees which involve national agreements. We engage in various——

Q. One moment. On this national disputes committee, is that a committee made up of all of the five standard [27] railway operating organizations?

A. Yes, insofar as it pertains to certain agreements which are negotiated and in effect with the five organizations.

Q. I see. Will you continue?

A. We also participate in various types of negotiations and often in various types of litigation where it is of interest to the five operating brotherhoods, and we have in a general sense cooperated and participated in these matters over a period of years.

Q. Are you familiar with the National Rules Movement of 1959 which culminated in litigation in 1962?

A. Yes. In that particular movement where the railroads had served notice on us to change existing rules.

Q. Now by notice on you do you mean the Switchmen's Union of North America, or do you mean all of the five operating organizations?

A. All of the five operating organizations. The Switchmen's Union with the other four operating unions participated jointly in that movement and participated in the [28] cost which emanated from that movement on a joint basis.

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[31] By Mr. Leibik:

Q. In that National Rules Movement, Mr. Speirs, did you retain counsel along with the other four operating organizations?

A. Yes, we did.

Q. And they represented all of the operating organizations in this litigation?

A. Yes.

• • • • • • • •

Q. Have you ever, Mr. Speirs, appointed a repr-
[32] sentative of the Switchmen's Union of North America to participate in Presidential Rules Commissions?

A. Yes, I have.

Q. Who was that appointee?

A. Vice President James Fallon.

Q. You designated him a member of the Presidential Rules Commission?

A. Yes.

Q. Did the other standard railway operating organizations have membership on that Commission?

A. They did.

Q. Did they work harmoniously and cooperatively?

A. They did.

• • • • • • • •

[33] By Mr. Leibik:

Q. Did you participate on Emergency Board No. 154, Mr. Speirs?

A. I did.

Q. Along with the other four standard railway operating organizations?

A. I did, yes.

• • • • • • • •

[34] By Mr. Leibik:

Q. Mr. Speirs, did you participate in selecting the members of the five standard railway labor organizations on Arbitration Board No. 282?

A. Yes.

Q. Whom did you designate as the representative of the Yard Service Employees on that arbitration board?

A. Well, the vice president of the Brotherhood of Railroad Trainmen was a designated member to represent us on that board, the Switchmen's Union.

Q. Approximately how many members did the Switchmen's Union of North America have on the Milwaukee Railroad on November 14, 1966?

A. Approximately 500.

[35] Q. When was the Switchmen's Union of North America organized?

A. In 1894.

Q. Is the Switchmen's Union of North America national in scope?

A. We have always been national in scope and so recognized.

Q. Has your organization been organized in accordance with the provisions of the Railway Labor Act?

A. Yes, we have.

Q. On how many railroads throughout the United States does the Switchmen's Union of North America hold labor contracts?

A. Approximately thirty.

Q. And you are organized on a craft or class basis?

A. That is correct.

Q. Representing yard service employees?

A. Yes.

Q. Do you admit to membership railroad employees who are working in yard service on all the carriers on which you hold contracts?

A. Yes.

[36] Q. Does the Switchmen's Union of North America participate in the selection and designation of the members of the First Division of the National Railroad Adjustment Board?

A. Yes, we do.

Q. Does your union pay the salary and expenses of the member designated by your organization to serve as its member on the National Railroad Adjustment Board, First Division?

A. Yes.

Q. That is pursuant to Section 3 of the Railway Labor Act which provides that members shall be selected and designated by the national labor organization of the employees, is that correct?

A. That is correct.

Q. How long have you so participated in the selection and designation of the First Division of the National Railroad Adjustment Board?

A. Since amendment to the Railway Labor Act which established the National Railroad Adjustment Board, which was in 1934.

Q. Do the labor members on the First Division of [37] the National Railroad Adjustment Board vote as a block?

A. Yes, that is their policy in executive sessions.

Q. The Switchmen's Union of North America is one of the five standard railway labor organizations in the operating end of the industry, is that correct?

A. That is correct.

Q. Could you identify the other four standard railway labor organizations in the industry?

A. The Brotherhood of Locomotive Engineers, the Order of Railroad Conductors and Brakemen, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen and the Switchmen's Union of North America.

Q. How long has the Switchmen's Union of North America had established locals on the Chicago, Milwaukee, St. Paul & Pacific Railroad Company?

A. Our first local was established on the Milwaukee Railroad at Milwaukee, Wisconsin, in 1899 known as [38] Local 10 and has continued in existence since that date.

Q. Now you have, I take it, Mr. Speirs, union shop agreements with all of the railroads across the country that you have a collective bargaining relationship with, is that correct?

A. Yes, to my knowledge we do have.

Q. Do your union shop agreements contain the exact language of Sec. 152 11th(c) of the Railway Labor Act

as an exception to the requirement of membership in your union?

A. Yes, that is true.

• • • • • • • •

[45] By Mr. Leibik:

Q. You state, Mr. Speirs, that you have union shop agreements on approximately thirty railroads throughout the country.

A. Yes.

Q. That is thirty?

A. Yes.

• • • • • • • •

[51] By Mr. Leibik:

Q. Mr. Speirs, what, if anything, took place on or about November 14, 1966, with respect to the employees in yard service on the Milwaukee Railroad?

A. Well, on that date we petitioned for the services of the National Mediation Board to investigate the representation dispute among the yard employees on the Milwaukee Railroad.

Mr. Leibik: May I have marked for identification as Plaintiffs' Exhibit No. 4 an application for investigation of representation dispute.

(Said document was thereupon marked Plaintiffs' [52] Exhibit 4 for identification.)

By Mr. Leibik:

Q. I hand you, Mr. Speirs, this document marked for identification as Plaintiff's Exhibit 4 and ask you if this is a true copy of the original document?

A. Yes, that is a true copy. My signature is affixed to it.

Q. What is this document, Mr. Speirs?

A. That is a petition for the services of the National Mediation Board to investigate a dispute on the Milwaukee Railroad.

Mr. Leibik: I offer Plaintiffs' Exhibit No. 4 in evidence.

Mr. Reedy: I have no objection to this, your Honor.

Mr. Uelman: If the Court please, we do not object to the authenticity of the document nor do we object to the receipt of the document as being one that is on file with the National Mediation Board.

However, we would not concede or agree that the [53] facts stated in the document are true and correct, and, in fact, we deny them.

The Court: May I inquire of you, Counsel for the Plaintiff, is Plaintiffs' Exhibit 4 for identification offered merely to show that such a document is on file or was on file with the National Mediation Board?

Mr. Leibik: That such a document is on file with the National Mediation Board.

The Court: With that limitation, then, and with no objection by any defendant, the court will admit Plaintiffs' Exhibit 4 for identification as Plaintiffs' Exhibit 4.

(Said document, so offered and received in evidence, was marked PLAINTIFFS' EXHIBIT 4.)

Mr. Leibik: May I have marked for identification as Plaintiff's Exhibit 5 the letter from the National Mediation Board, Executive Secretary, Thomas A. Tracy, to Mr. S. W. Amour, Assistant to the Vice President, Personnel, Chicago, Milwaukee, St. Paul & Pacific Railroad, [54] and Mr. Charles Luna, President, Brotherhood of Railroad Trainmen.

(Whereupon said document was marked Plaintiffs' Exhibit 5 for identification.)

By Mr. Leibik:

Q. Mr. Speirs, I hand you what has been marked for identification as Plaintiffs' Exhibit No. 5 and ask you if that is a true and correct copy of a letter received from Mr. Thomas Tracy?

A. Yes. I received a carbon copy of this letter. It is a true and correct copy.

* * * * * * *

[55] The Court: With no objection by any defendant, Plaintiffs' Exhibit 5 for identification may be admitted into evidence as Plaintiffs' Exhibit 5.

(Said document, so offered and received in evidence, was marked PLAINTIFFS' EXHIBIT 5.)

* * * * * * *

[57] May I have this document marked as Plaintiffs' Exhibit 6 for identification, which is a letter from the National Mediation Board to Mr. Amour, Mr. Luna and Mr. Speirs dated December 8, 1966.

(Whereupon said document was marked Plaintiffs' Exhibit 6 for identification.)

By Mr. Leibik:

Q. Mr. Speirs, I hand you this document which has been marked for identification as Plaintiffs' Exhibit No. 6 and ask you whether or not this is a true and correct copy of the letter you received on or about December 8, 1966, from the National Mediation Board?

A. Yes, it is.

Mr. Leibik: I offer Plaintiffs' Exhibit No. 6 in evidence, your Honor.

Mr. Naughton: We have no objection.

[58] The Court: With no objection, Plaintiffs' Exhibit No. 6 for identification may be admitted into evidence as Plaintiffs' Exhibit 6.

(Said document, so offered and received in evidence, was marked PLAINTIFFS' EXHIBIT 6.)

By Mr. Leibik:

Q. Mr. Speirs, have you received any further communication from the National Mediation Board subsequent to

the docketing of this representation dispute on December 8, 1966?

A. No, not to my knowledge. Or may I change that answer and say yes, that I have.

* * * * * * *

Q. Mr. Speirs, did you accompany your petition with authorization to act cards, the petition you filed with the National Mediation Board?

A. Yes, we accompanied it with signed authorization cards.

* * * * * * *

Mr. Leibik: May I have marked for identification as Plaintiffs' Exhibit No. 7 a document entitled, "Representative Authorization"?

(Whereupon said document was marked Plaintiffs' Exhibit 7 for identification.)

[60] By Mr. Leibik:

Q. Mr. Speirs, I hand you what has been marked for identification as Plaintiffs' Exhibit No. 7, a document entitled, "Representation Authorization," and I ask you to identify this document?

A. This is a representation authorization card which our organization has signed by members who wish to be represented by the Switchmen's Union and it is used as affirmative evidence to submit to the National Mediation Board that there is a representation dispute on the property.

Mr. Leibik: I offer what has been marked for identification as Plaintiffs' Exhibit 7 into evidence.

Mr. Uelmen: We have no objection.

Mr. Reedy: No objection.

Mr. Naughton: None.

The Court: With no objection by any defendant, Plaintiffs' Exhibit 7 for identification may be admitted into evidence as Plaintiffs' Exhibit 7.

(Said document, so offered and received in evidence, was marked PLAINTIFFS' EXHIBIT NO. 7.)

* * * * * * *

[63] Mr. Leibik: May I have this marked as Plaintiffs' Exhibit No. 8, a memorandum of agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen covering the union shop dated the 9th day of June, 1953.

(Said document was thereupon marked Plaintiffs' Exhibit 8 for identification.)

By Mr. Leibik:

Q. Mr. Speirs, I hand you what has been marked for identification as Plaintiffs' Exhibit No. 8, a document entitled, "Union Shop Agreement." Can you identify that document?

A. Well, this is an agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen covering union shop. It is dated the 9th day of June, 1953.

Q. Are you familiar with its provisions?

A. Yes, I am.

Q. Do you know of any instance where a member of [64] the Switchmen's Union employed on the Milwaukee Railroad under this union shop agreement has ever been discharged for non-compliance with this agreement?

A. No, I do not.

Mr. Leibik: I offer Plaintiffs' Exhibit No. 8 into evidence.

Mr. Reedy: The Milwaukee has no objection, your Honor.

Mr. Uelmen: Your Honor, we have no objection to the document. It is a matter of checking it to see whether it is identical to the agreement.

The Court: You can do it after this session.

Mr. Uelmen: Yes, your Honor.

The Court: Subject to your checking it, the court will admit Plaintiffs' Exhibit 8 for identification as Plaintiffs' Exhibit 8, and that with no objection by any of the parties unless some substantial reason for objection is made later.

(Said document, so offered and received in evidence, [65] was marked PLAINTIFFS' EXHIBIT 8.)

Mr. Leibik: May I have marked as Plaintiffs' Exhibit 9 the agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen dated the 1st day of February, 1967.

(Whereupon said document was marked Plaintiffs' Exhibit 9 for identification.)

* * * * * * *

By Mr. Leibik:

Q. Will you identify this document, please, Mr. Speirs?

A. That is an agreement between the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the [66] Brotherhood of Railroad Trainmen covering union shop.

The Court: Dated when?

Mr. Leibik: Dated February 1, 1967.

By Mr. Leibik:

Q. Does this agreement purport to amend the previous existing union shop agreement on the Milwaukee Railroad?

A. Yes, it does.

Mr. Leibik: I offer into evidence Plaintiffs' Exhibit 9.

Mr. Uelmen: We have the same comment with respect to Exhibit 9 as we had to Exhibit 8.

The Court: With no objection——

Mr. Naughton: If your Honor please, I have no objection but Mr. Speirs identified this as being applicable to the whole railroad while on its face it shows it is only applicable to lines east.

The Court: Only to what?

Mr. Naughton: Only to lines east. The railroad is divided into two segments, lines east and lines west. [67] The Court: He said it was an agreement with the railroad and the Brotherhood dated February 1st, 1967.

Mr. Leibik: That is quite correct.

The Court: What it provides we will determine later. Even if what you say is true, you have no objection?

Mr. Naughton: No, your Honor.

The Court: All right. With no objection, Plaintiffs' Exhibit 9 for identification may be admitted into evidence as Plantiffs' Exhibit 9 subject to checking for authenticity or authentication.

(Said document, so offered and received in evidence, was marked PLAINTIFFS' EXHIBIT 9.)

By Mr. Leibik:

Q. Mr. Speirs, how did this agreement of February 1, 1967, come to your attention?

A. Well, it was mailed to me by one of our officers, one of the local union officers on the Milwaukee Railroad.

* * * * * * * *

By Mr. Leibik:

Q. Mr. Speirs, you stated that your membership on the Milwaukee Railroad on November 14, 1966, was approximately 500?

A. That is correct.

* * * * * * * *

By Mr. Leibik:

Q. Are you receiving any dues from members of the Switchmen's Union on the Chicago, Milwaukee, St. Paul & Pacific Railroad Company?

A. Yes, we are.

Q. Has there been any loss of dues income since [69] the effective date of the agreement in question, February 1, 1967?

A. Yes, there has been a loss of income from approximately 400 employees who were former members of the Switchmen's Union on the Milwaukee Railroad.

* * * * * * * *

[71] (Whereupon at 4:40 o'clock p. m. an adjournment was taken to 10:00 o'clock a. m. the following day, April 4, 1967.)

* * * * * * * *

[72] Before Judge Hoffman,
April 4, 1967.

The hearing was resumed, pursuant to adjournment, at 10:00 o'clock a.m.

* * * * * * * *

[73] The Clerk: 67 C 285, W. L. Birkholz, et. al. v. Elmer L. Dirks, et. al., further hearing on plaintiffs' motion for a preliminary injunction.

The Court: No, it is on trial, including that.

The Clerk: On trial.

The Court: That is included in it.

* * * * * * * *

[74] **NEIL P. SPEIRS,**

a witness called by and on behalf of the plaintiffs, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Mr. Leibik: We had concluded our direct examination of Mr. Speirs.

The Court: Is there any cross-examination of this witness?

Mr. Uelmen: Yes, your Honor.

The Court: Mr. Uelmen.

Cross-Examination, by Mr. Uelmen.

Q. Mr. Speirs, has the Switchmen's Union of North America ever been certified by the National Mediation

Board to represent any employees on the Chicago, Mil-
[75] waukee, St. Paul & Pacific Railroad Company lines east?

A. Not certified by the National Mediation Board, no.

Q. Has the Switchmen's Union of North America ever had a written collective bargaining agreement with the Chicago, Milwaukee, St. Paul & Pacific Railroad?

A. To my knowledge we at one time prior to the Railway Labor Act represented switchmen on a yard basis and some of those switchmen were on the Milwaukee Railroad.

Q. By prior to the Railway Labor Act do you mean prior to 1926?

A. Yes.

Q. At any time subsequent to 1926 did the Switchmen's Union of North America have a written collective bargaining agreement with the Milwaukee Road?

A. Not to my knowledge.

Q. Do you know of your own knowledge that the Brotherhood of Railroad Trainmen has a written collective bargaining agreement with the Milwaukee Road?

[76] A. I understand that they have, yes.

Q. And do you know that the collective——

The Court: You understand they have?

The Witness: They have, yes.

By Mr. Uelmen:

Q. Do you know, Mr. Speirs, whether that bargaining agreement includes the unit of yardmen?

A. Yes.

Q. Do you know that the Brotherhood of Railroad Trainmen on the Milwaukee Road has a general grievance committee?

A. Yes, I understand that structure.

Q. I believe you were general chairman at one time of a Switchmen's Union Grievance Committee, General Grievance Committee, is that true?

A. That is correct.

Q. Does the Switchmen's Union of North America contribute any financial support to the General Grievance Committee of the Brotherhood of Railroad Trainmen on the Milwaukee Road?

A. We do not contribute cash towards that Committee, although we do absorb some of that Committee's expense by representing our members who otherwise would [77] have to be represented by the Brotherhood of Railroad Trainmen.

Q. Now, Mr. Speirs, is it your testimony that the Switchmen's Union of North America represents its members on the Milwaukee Road in negotiations with the Milwaukee Road?

A. Insofar as handling what we term minor disputes, grievances, and so forth, yes, we represent our members.

Q. Do you know of any minor disputes that the Switchmen's Union of North America has handled on the Milwaukee Road in the past year?

A. Yes. I have been familiar with at least two or three reinstatement cases which we have handled, and, as a matter of fact, which we had to take to court to effect that reinstatement.

Q. Are you talking about Mr. Fautek and Mr. Bushey?

A. I believe those are the names.

Q. Are those the only two reinstatement cases that you recall?

A. Yes. I would say those are the only two that I recall. I would not state that those are the only two that have been handled.

Q. Now when you say "handled," Mr. Speirs, with [78] whom do you handle those reinstatement cases?

A. We handle them initially with the designated local officer which is designated by the railroad and then we handle them on appeal by the highest designated officers of the railroad.

Q. And when you say we handle them, specifically who are you referring to from the Switchmen's Union?

A. I am referring to our local officers and to our vice presidents who may be assigned to handle these grievances on appeal.

Q. Now when you talk about minor disputes, Mr. Speirs, are you referring specifically to discipline cases of employees?

A. And disputes which arise over the interpretation of agreements.

Q. Do you personally handle any disputes over the interpretation of agreements on the Milwaukee Road?

A. Pardon me. Yes. I don't personally but our organization does.

Q. You don't personally?

[79] A. No, but our organization does.

Q. Who handles them for your organization?

A. Our local chairman will initiate the dispute over the interpretation of an agreement and if it is not settled with the local officer, it will then be appealed to a higher officer and in most instances, I assign a vice president to handle that particular case on appeal.

Q. Specifically what agreement are you referring to when you refer to interpretations of the agreement?

A. I am referring to the collective bargaining agreements which are in effect on the Milwaukee Railroad which include all of them.

Q. Are you referring to the bargaining agreement that exists between the Brotherhood of Railroad Trainmen and the Milwaukee Road?

A. That is correct.

Q. Does the Switchmen's Union negotiate any agreement with the Milwaukee Road?

A. No, we do not negotiate collective bargaining agreements.

[80] Q. Do you know whether the Switchmen's Union has requested the Brotherhood of Railroad Trainmen to

represent its members in disputes involving the contract with the Milwaukee Road?

Mr. Leibik: I am going to object to this question. I fail to see why this can be regarded as any appropriate line of inquiry on the issue of whether or not the union shop agreement is valid when it precludes a member of a qualified union from maintaining his membership in his choice of union.

The Court: What is the purpose?

Mr. Uelmen: The purpose is to establish, your Honor, that the sole collective bargaining agreement on this railroad is between the Brotherhood of Railroad Trainmen and the Milwaukee Road; that the Switchmen's Union does not have an agreement; they do not have the authority to represent employees on this railroad, and that line of examination.

Mr. Leibik: We will so stipulate, but this line of inquiry should more appropriately have been addressed to Congress in 1951. It has nothing whatsoever to do, it has [81] no relevancy to the issue here.

The Court: I will let the witness answer over objection and then I am going to have to recess. I see the lawyers have come in in connection with a motion and it is a motion which I have to decide.

The Witness: Would you restate the question?

The Court: Read the question to the witness.

(Question read by the reporter.)

By the Witness:

A. I recall one case resulting from a particular agreement which was negotiated by the Brotherhood of Railroad Trainmen whereby they precluded the Switchmen's Union from representing its members at an investigation.

The only alternative for that member of the Switchmen's Union to obtain representation was to request it

from the Brotherhood of Railroad Trainmen which I think was done in one or two isolated situations.

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[82] By Mr. Uelmen:

Q. Now, Mr. Speirs, other than the grievances which the Switchmen's Union may handle for its individual members on its property, does the Switchmen's Union of North America contribute any financial support to the General Grievance Committee of the Brotherhood of Railroad Trainmen on this property?

• • • • • • • •

By the Witness:

A. Well, if I understand your question correctly, we negotiate agreements which are applicable to the Milwau- [83] kee Railroad when we do it on a national basis such as vacation agreements, paid holiday agreements, and that is a joint endeavor in our agreements which are applicable on the Milwaukee Railroad.

By Mr. Uelmen:

Q. What do you mean by that as a joint endeavor?

A. Well, for instance, the vacation agreement was handled jointly by the five operating brotherhoods in a concerted effort where each organization participated and assumed its own proportion of expenses and so forth in arriving at these agreements which have application on the Milwaukee Railroad as well as other railroads.

Q. Are you referring to the June 1954 agreements?

A. No. I am referring to that agreement—I am referring to the national vacation agreement which was first negotiated in 1949.

Q. In other words, if I understand your testimony correctly, Mr. Speirs, the five operating brotherhoods each sent a representative to a national conference at which a [84] vacation agreement was negotiated for all of the railroads covered by that particular negotiations?

A. Yes.

Q. And I understand your testimony is that that is your financial contribution to the Brotherhood of Railroad Trainmen's General Grievance Committee on the Milwaukee Railroad?

A. Well, I would say that that agreement has application under the General Grievance Committee on the Milwaukee Railroad and therefore we did participate in negotiating the agreement which has application on the Milwaukee Railroad.

Q. Was the Brotherhood of Railroad Trainmen represented at that national conference?

A. Yes, they were also represented.

Q. Now other than that additional item, does the Switchmen's Union of North America contribute any financial support to the General Grievance Committee of the Brotherhood of Railroad Trainmen on the Milwaukee Road?

A. Not in areas other than I have stated.

Q. Do you know what the assessment is on the members of the Brotherhood of Railroad Trainmen on the Milwaukee Road to operate the General Grievance Committee?

[85] A. No, I would have no way of knowing what it was.

Q. You have no idea?

A. That is a matter——

The Court: You don't know. Is that it?

The Witness: That is right.

* * * * * * *

By Mr. Uelmen:

Q. Now I believe you testified that you had 500 members of the Switchmen's Union in November of 1966 on the Milwaukee Road?

A. Approximately, yes.

Q. Is that it approximately?

A. Yes.

Q. Do you know the exact number of members you had?

A. I recall, I think, 471 or in that area.

Q. From where did you obtain that figure?

A. From our International records.

Q. Did you have 471 in October of 1966?

[86] A. I wouldn't know exactly unless I checked the records.

* * * * * * *

By Mr. Uelmen:

Q. Did you check any of your records before you came to this trial?

A. No.

Q. Your memory, then, gives you the figure of 471 for November of 1966?

A. Yes.

Q. Do you know whether you had 471 members in August of 1966?

A. No.

* * * * * * *

[88] By Mr. Uelmen:

Q. Do you know how many members you did have in August of 1966?

A. No.

* * * * * * *

[93] Q. I am handling you what has been marked as Plaintiffs' Exhibit No. 7 which I believe is an authoriza-
[94] tion card used by the Switchmen's Union.

A. That is correct.

Q. Was that authorization card used on the Milwaukee Road in 1966?

A. Yes.

Q. To whom did you give those authorization cards?

A. To members and local officers of the Milwaukee Road who are employees of the Milwaukee Railroad.

Q. Did you give them to Mr. Van Heck?

A. Mr. Van Heck had these cards for distribution to the people I named.

Q. He already had them?

A. He secured them from our office, obtained them from our office.

Q. When did he secure them from your office?

A. Vice presidents always carry a supply of authorization cards. That is part of their equipment.

Q. Did he have to obtain an additional supply for the Milwaukee Road?

A. It is possible.

* * * * * * *

[99] **Cross-Examination**, by Mr. Naughton.

Q. Mr. Speirs, directing your attention to an exhibit which was a petition to the Mediation Board for a representation election on the Milwaukee Road, I ask you first was that an election just on lines east or did that include the entire Milwaukee Road?

A. It includes the entire Milwaukee Railroad.

Q. On that exhibit it says something like 718 authorization cards were submitted therewith, is that correct?

A. With the application.

Q. Were those authorization cards on both lines east and lines west?

A. They were.

Q. Could you tell me approximately how many were on lines east?

A. No, I couldn't.

Q. You talked about approximately 471 members who were dues-paying members to the Switchmen's Union of North America?

A. That is correct.

[100] Q. Does that mean that they send the International dues each month?

A. That does.

Q. Approximately how many of those 471 were on lines east?

A. I do not know.

Q. Yesterday you talked about losing 400 members, as I understand it, since this union shop contract was signed, is that correct?

A. Approximately, yes.

Q. That contract was signed on or about February 1st, is that correct?

A. Yes.

Q. Now how did you determine that those members were lost?

A. By a report from the International Secretary and Treasurer who makes a report to me on these affairs from the International Union.

Q. Did they stop sending in their International dues?

A. Yes.

Q. Have any of those members not sent in dues for two months?

A. I think that is a correct statement, yes, for [101] more than two months.

Q. For more than two months?

A. Probably.

Q. What dues are now due, February and March?

A. February and March, yes.

Q. Are the April dues due?

A. Yes.

Q. They are due right now?

A. Yes.

Q. Approximately how many have not sent in their dues for March and April?

A. I really don't know.

Q. Of those 400 members that you say that you have lost, approximately how many of those 400 were on lines east?

A. We do not keep a separate record.

* * * * * * *

[102] By Mr. Naughton:

Q. If they were on lines west, they, of course, would not be discouraged by the contract on lines east, is that correct?

A. What contract?

Q. The union shop contract that is in issue here.

A. No, I would say not.

Q. You are aware there is no union shop contract on lines west.

A. I am.

* * * * * * * *

Mr. Naughton: He answered he knows there was no union shop contract on lines west which contains the type of clause which might be applied against the Switchmen's Union of North America. Is that correct?

[103] The Witness: Yes.

Redirect Examination, by Mr. Leibik.

Q. Mr. Speirs, you were aware, of course, that there is a union shop agreement on lines west on the Milwaukee Railroad which contains the specific language of the Railway Labor Act and permits membership in any union national in scope qualified to select and designate a representative on the National Railroad Adjustment Board?

A. Yes, there is.

* * * * * * *

[104] **WILLIAM R. MEYERS**,

a witness called by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination, by Mr. Leibik.

Q. Will you state your name, please?

A. William R. Meyers.

Q. Where do you live, Mr. Meyers?

A. 401 South LaSalle Street, Chicago.

* * * * * * * *

[105] Q. Do you held any position with the Switchmen's Union of North America?

A. Yes, I do.

Q. What is that position?

A. Executive Vice President.

Q. How long have you been Executive Vice President of the Switchmen's Union of North America?

A. A little over seven years.

Q. What previous offices did you hold in the Switchmen's Union of North America prior to your assumption of duties as Executive Vice President?

A. I was local President, General Chairman on the railroad that I worked, delegate to the Superior Federation of Labor, and a member of the Finance and Insurance Board for the International.

Q. Did you hold any seniority rights on any carrier?

A. Yes, I do.

Q. What railroad is that?

[106] A. The Lake Superior Terminal & Transfer Railway Company in Superior, Wisconsin.

Q. Will you briefly relate your railroad experience, your previous railroad experience?

A. I hired out on the Terminal in August of 1937. I hold continuous seniority there. I also worked for the Duluth, Mesabi & Iron Range, and during the service I was furloughed and worked for the Union Pacific at Laramie, Wyoming.

Q. Do you hold any position with the National Adjustment Board?

A. Yes, I do.

Q. What is your position?

A. I am a member of the National Railroad Adjustment, First Division, representing switchmen.

Q. Have you also served as chairman of the National Railroad Adjustment Board, First Division?

A. Yes, I have.

Q. Would you name the other labor union members and the operating organizations which have selected and designated them as their respective members?

A. Don Miller is representing the Brotherhood of [107] Locomotive Firemen.

Mr. Sam Van Der Hei represents the Brotherhood of Railroad Trainmen.

Mr. Robert Delaney represents the Brotherhood of Locomotive Engineers.

Mr. Kenny Levin represents the Order of Railroad Conductors and Brakemen.

• • • • • • • •

[109] Q. Mr. Meyers, who pays your salary as a member of the National Railroad Adjustment Board?

A. The Switchmen's Union.

Q. Do each of the other four standard operating railway organizations pay the salary of their respective members on the Board?

A. As I understand it, that is correct.

• • • • • • • •

[111] O. You have testified that your salary is paid by the Switchmen's Union of North America, is that [112] correct?

A. Yes, sir.

Q. And the salary of the representative of the Brotherhook of Locomotive Firemen and Enginemen is paid by that organization?

A. Yes, sir.

Q. The salary of the members selected and designated by the Brotherhood of Railway Trainmen is paid by that organization?

A. Yes.

Q. And the salary of the representative of the Order of Railway Conductors and Brakemen is paid by that organization?

A. Yes, sir.

Q. And the salary of the member selected and designated by the Brotherhood of Locomotive Engineers is paid by that organization?

A. Yes, sir.

Q. Do you hold executive sessions with the other labor members on the First Division of the National Railroad Adjustment Board in adjudicating cases?

A. Yes, sir.

* * * * * * *

[113] Q. Do you vote as a unit on cases before the First Division of the National Railroad Adjustment Board?

A. Yes, sir.

Q. Are there occasions, Mr. Meyers, when the First Division of the National Railroad Adjustment Board is jointly involved in litigation?

A. Yes, sir.

Q. Would that situation arise over the enforcement of an award handed down by the First Division?

A. It could.

Q. Or would it arise in the case of an attempt to impeach an arbitrator's award?

A. Yes, it could.

[114] Q. In such cases are the members of the National Railroad Adjustment Board joined as parties to the litigation?

A. Yes, they are

Q. And have the members of the National Railroad Adjustment Board jointly secured services of attorneys to represent them in this litigation?

A. Yes, they have.

* * * * * * *

Q. Mr. Meyers, have you had occasion to represent members of the Switchmen's Union of North America employed by the Milwaukee Railroad at investigations and hearings held pursuant to the provisions of the collective bargaining agreement between the Brotherhood of Railroad Trainmen and the Milwaukee Railroad?

[115] A. Yes, I have.

Q. Have you had occasion to represent members of the Switchmen's Union of North America employed by the Milwaukee Railroad in direct conferences with officials of the Milwaukee Railroad?

A. Yes, I have.

Q. What was the nature of those conferences?

A. Well, they were in the nature of time claims, reinstatement cases.

Q. Were you successful in resolving some of those grievances?

A. Some of them, yes.

Q. Have you personally processed grievances and various cases, time claims and such, of members of the Switchmen's Union of North America employed by the Milwaukee Railroad to the First Division of the National Railroad Arbitration Board?

A. Yes, I have.

Q. Have those cases been adjudicated by the First Division of the National Railroad Arbitration Board?

A. No, they haven't; they are pending.

Q. You had no cases before the First Division [116] which had been adjudicated by the First Division?

A. Not me personally. I mean, the organization has been a petitioner in several cases before the Adjustment Board which have been adjudicated and that are awards of the Adjustment Board today, they were rendered awards.

Q. And your statement is that you presently have grievances pending before the First Division involving employees of the Milwaukee Railroad in yard service?

A. Yes, sir.

Q. Mr. Meyers, have you actively participated in meetings of the Railway Labor Executive Association along with representatives of the four other operating organizations?

A. Yes, I have.

Q. What did these meetings concern themselves with?

A. They concerned themselves with problems that the organizations were interested in that would affect membership of the respective organizations.

Q. Have you worked jointly with the Brotherhood [117] of Railroad Trainmen and other standard railway operating unions in matters of national wage and rules movements?

A. Yes, I have.

Q. In mediation cases before the National Mediation Board?

A. Yes. I would say yes to that.

Q. And in National Presidential Emergency Board cases?

A. Yes.

Q. Before the Presidential Rules Commission?

A. Yes.

Q. Before Arbitration Board 282 established by Congress?

A. Yes.

Q. Have you met in conference with representatives of the Milwaukee Railroad with respect to the application of the Washington job protection agreement?

A. Yes, I have.

Q. Are you serving at the present time as a member of the Vacation Disputes Committee?

A. Yes, I am.

Q. And this is a committee established by the five op- [118] erating organizations to resolve disputes which arise under the national agreements?

A. Yes, it is.

Q. And those agreements affect the switchmen employed on the Milwaukee Railroad?

A. Yes, it does.

* * * * * * * *

[123] **Cross-Examination**, by Mr. Reedy.

* * * * * * * *

Q. Do I take it that these claims that your organization processed on behalf of some Milwaukee Railroad employees, they were processed under the provisions of the contract with the Brotherhood of Railroad Trainmen?

A. That is correct.

[124] Q. I understand, do I, correctly that the Switchmen's Union of North America does not have a contract with the Milwaukee Railroad?

A. Well, let me say this to answer that: We are a party to the—say like the Washington job protection agreement or the National Vacation Agreement which is also on the Milwaukee Road, and so therefore we would have a contract with the Milwaukee Road insofar as those agreements are concerned.

Now the basic agreement, no, we have no basic agreement.

Q. Now this agreement that you talk about covers every Class I railroad in the United States, does it not, the Washington Job Agreement?

A. Yes, sir.

Q. And there are over a hundred such railroads in the United States, isn't that correct?

A. I would say yes.

Q. But as far as the Milwaukee Railroad is concerned individually, you do not have a contract with that railroad, isn't that a fact?

A. Only in the fact that they are one of the hundred railroads, yes.

[125] Q. Only in the sense that you have applied it to the national situation, is that right?

A. Yes.

* * * * * * * *

Q. How many cases of the Milwaukee Railroad now pending before the National Railroad Arbitration Board are there in which officers of the Switchmen's Union of North America represent the employees, do you know?

A. I think there is three.

Q. There are three. Do you know the names of the [126] cases?

A. Well, one would be the O'Trembiak case; one would be the Larsen case; one would be the Miller case. And we are presently working on a case for Miller, a different Miller from Milwaukee, Stanley Miller from Milwaukee.

Q. Have any of the cases that you have prosecuted before the Board been adjudicated by the Board?

A. No, they have not.

* * * * * * * *

Cross-Examination, by Mr. Naughton.

* * * * * * * *

[127] Q. Did you ever sign any of these national vacation agreements?

A. I would say—You see, it has been amended from time to time, Mr. Naughton. I would say that there are probably some of the amendments that have my signature on, yes, sir.

Q. In those negotiations, did you purport to represent any railroad on which the trainmen has a contract?

* * * * * * * *

[128] By the Witness: A. Yes.

By Mr. Naughton: Q. Did the Trainmen represent the Switchmen's Union in those negotiations?

A. They represent all of the employees involved and members of the Switchmen's Union were involved, yes, sir.

Q. Is it your testimony that there had to be a joint signing of every one of these agreements by each of the representatives before any of the railroads could be bound?

A. The negotiations were handled on a national basis and that would be the way you would sign them, the five organizations would each have a representative and they would sign it and all the members of each organization would be bound by the signature as from the national handling, that is right.

Q. Was there any agreement requiring the five organ-
[129] izations to hold together until the agreement was signed either in writing or orally?

A. I would imagine that they have agreed orally that that is the way they would handle it, yes.

Q. Did you ever hear of anybody, either a railroad or a union, breaking away from national negotiations and signing an individual property agreement?

A. Yes.

* * * * * * *

Mr. Leibik: This concludes our case.

The Court: Does the plaintiff rest?

Mr. Leibik: The plaintiff rests.

Plaintiffs rest.

Mr. Uelmen: May it please the Court, we move to dismiss the complaint. The defendant Dirks moves to dismiss the complaint.

* * * * * * *

[153] The Court: Mr. Leibik, as I understand it, your individual clients were all yard service employees?

Mr. Leibik: Yard service employees.

Plaintiffs' Exhibit No. 4

[154] The Court: And the Switchmen's Union of North America does not take the position that the agreement fails to provide for inter-craft mobility. The only problem for which Section 152 provides the solution of an alternate union membership is alternate union membership under a union shop contract.

You maintain, as I understand it, instead, that the statute guaranteed to them the right to membership in any union.

Mr. Leibik: Not in any union, your Honor, no. Not in any union, only in one of the five qualified unions, and that is precisely what the Congress of the United States had before it in 1950 and 1951.

PLAINTIFFS' EXHIBIT NO. 4.

National Mediation Board

Application for Investigation of Representation Dispute
To the National Mediation Board,
Washington, D. C.

A dispute has arisen among the employees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Plaintiffs' Exhibit No. 4

Parties to dispute

Switchmen's Union of North America
(Petitioning organization or representative)

Brotherhood of Railroad Trainmen Date unknown
(Organization holding existing agreement, if any, and date thereof)

[None]
(Other organizations or representatives involved in dispute)

If more than one craft or class, list separately

Craft or class of employees involved	Number of employees involved	Number authorizing representation
1. Yardmen (including yard foreman,		
2. helpers and switchmen)	1175	718
3.		
4.		
5.		
6.		
7.		

(Use separate line for each craft or class)

Evidence of representation

The evidence of representation has been forwarded under separate cover and consists of (718) signed authorization cards
(Describe, as authorization cards, petition, etc.)

Signed at Buffalo, New York, this 14th day of November, 1966.

Name /s/ Neil P. Speirs
(Signature of applicant)
Title President

Docketed

Filed
Jul 7 1967

(File this application in duplicate)

(If necessary, use and attach additional sheet)

PLAINTIFFS' EXHIBIT NO. 5.

National Mediation Board
Washington, D. C. 20572

November 18, 1966

Mr. S. W. Amour
Asst. to Vice President-Personnel
Chicago, Milwaukee, St. Paul &
Pacific Railroad Company
374 Union Station
Chicago, Illinois 60606

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
666 Euclid Avenue
Cleveland, Ohio 44114

Gentlemen:

We have an application from the Switchmen's Union of North America, AFL-CIO to investigate a representation dispute under the provisions of Section 2, Ninth, of the Railway Labor Act among the following employees of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company:

> Yardmen (including yard foreman, helpers and switchmen)

Mr. Amour is requested to furnish the total number of employees covered by this application and he is also invited to submit any other statement he may care to make.

Our records indicate that the employees are presently represented by the Brotherhood of Railroad Trainmen

and Mr. Luna is invited to submit any statement he may care to make with respect to this application.

Very truly yours,

/s/ Thomas A. Tracy
Thomas A. Tracy
Executive Secretary

cc: Mr. Neil P. Speirs, Int'l President
Switchmen's Union of North America, AFL-CIO
3 Linwood Avenue
Buffalo 2, New York

Please Make Submission and Replies to Correspondence in Duplicate

Docketed

Filed
Jul 7 1967

PLAINTIFFS' EXHIBIT NO. 6.

National Mediation Board
Washington, D. C. 20572

December 8, 1966

Case No. R-3895

Mr. S. W. Amour
Asst. to Vice President-Personnel
Chicago, Milwaukee, St. Paul &
Pacific Railroad Company
374 Union Station
Chicago, Illinois 60606

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
666 Euclid Avenue
Cleveland, Ohio 44114

Mr. Neil P. Speirs, Int'l President
Switchmen's Union of North America, AFL-CIO
3 Linwood Avenue
Buffalo 2, New York

Gentlemen:

Reference is made to the application made by the Switchmen's Union of North America for the services of this Board under the provisions of Section 2, Ninth, of the Railway Labor Act in a dispute involving representation of:

Yardmen (including yard foreman, helpers and switchmen)

Employees of Chicago, Milwaukee, St. Paul & Pacific RR Co.

Plaintiffs' Exhibit No. 6

This application has been docketed as our Case No. R-3895 and will hereafter be referred to by that number. A mediator will be assigned to investigate this dispute as soon as possible consistent with prior commitments.

Very truly yours,
/s/ Thomas A. Tracy
Thomas A. Tracy
Executive Secretary

C. M. St. P. & P. R. R. Co.
Office of
Dec 12 1966
Vice President
Labor Relations
Chicago, Illinois

United States District Court
Northern District of Illinois
Before Judge Hoffman
Plaintiff Ex. No. 6
Dorothy L. Brackenbury
Official Court Reporter
Docketed
Filed
Jul 7 1967
at .... O'clock ....
Elbert A. Wagner, Jr., Clerk
67C285

Plaintiffs' Exhibit No. 7

PLAINTIFFS' EXHIBIT NO. 7.

Representation Authorization

I hereby designate the Switchmen's Union of North America as my representative in the handling of all matters relating to rates of pay, rules and working conditions, etc., arising under the Railway Labor Act as amended.

....

Name of Railroad Yard or Terminal

Title of Position

☐ Foreman .....

☐ Helper Signature

☐ Switch Tender .....

☐ Car Retarder Date

.....

_____

Name

_____

Address

_____

City

_____

Railroad Yard or Terminal

Docketed

Filed
Jul 7 1967
at ..... O'clock .....

Elbert A. Wagner, Jr.
67C285 Clerk

PLAINTIFFS' EXHIBIT NO. 8.

Memorandum of Agreement
as between the
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company
(Lines East)
and the
Brotherhood of Railroad Trainmen
Covering Union Shop

This agreement, made this 9th day of June, 1953, by and between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the "Company", and the employes thereof represented by the Brotherhood of Railroad Trainmen, hereinafter referred to as the "Brotherhood", witnesseth:

It Is Agreed:

Section 1.—In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the company now or hereafter subject to the rules and working conditions agreement between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreement, become members of the Brotherhood within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in the Brotherhood; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreement.

Plaintiffs' Exhibit No. 8

Section 2.—The requirements of membership provided for in Section 1 of this agreement shall be satisfied if any employe shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employes of a craft or class in train, yard, engine or hostling service that is, in any of the services or capacities, covered by Section 3, First, (h), of the Railway Labor Act, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board; provided, however, that nothing contained in this agreement shall prevent any employe from changing membership from one organization to another organization admitting to membership employes of a craft or class in any of the services above specified.

Section 3. (a)—Employes who retain seniority under the rules and working conditions agreement governing their class or craft and who are regularly assigned or transferred to full time employment not covered by such agreement, or who, for a period of thirty days or more, are (1) furloughed on account of force reduction, or (2) on leave of absence, or (3) absent on account of sickness or disability, will not be required to maintain membership as provided in Section 1 of this agreement so long as they remain in such other employment, or furloughed or absent as herein provided. Should such employes return to any service covered by the said rules and working conditions agreement and continue therein thirty calendar days or more, irrespective of the number of days actually worked during that period, they shall, as a condition of their continued employment subject to such agreement, be required, within thirty-five calendar days from date of their return to such service, to comply with the provisions of Sections 1 and 2 of this agreement.

(b)—The seniority status and rights of employes furloughed to serve in the Armed Forces or granted leaves of

absence to engage in studies under an educational aid program sponsored by the federal government or a state government for the benefit of ex-service men shall not be terminated by reason of any of the provisions of this agreement but such employes shall, upon resumption of employment, be considered as coming within Section 1 of this agreement.

Section 4.—Nothing in this agreement shall require an employe to become or to remain a member of the Brotherhood if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. For purposes of this agreement, dues, fees, and assessments, shall be deemed to be "uniformly required" if they are required of all employes in the same status at the same time.

Section 5, Revised Effective November 1, 1953.

(a)—Each employe covered by the provisions of this agreement shall be considered by the Company to have met the requirements of the agreement unless and until the Company is advised to the contrary in writing by the Brotherhood. The Brotherhood will notify the Company in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, of any employe who it is alleged has failed to comply with the terms of this agreement and who the Brotherhood therefore claims is not entitled to continue in employment subject to the Rules and Working Conditions Agreement. The form of notice to be used shall be agreed upon by the Company and the Brotherhood and the form shall make provision for speci-

fying the reasons for the allegation of non-compliance. Upon receipt of such notice, the Company will, within ten calendar days of such receipt, so notify the employe concerned in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. Copy of such notice to the employe shall be given the Brotherhood. An employe so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall within a period of ten calendar days from the date of receipt of such notice, request the Company in writing by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt, to accord him a hearing. Upon receipt of such request the Company shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing with copy to the Brotherhood, by Registered Mail, Return Receipt Requested, or by personal delivery evidenced by receipt. A representative of the Brotherhood shall attend and participate in the hearing. The receipt by the Company of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the Company is rendered.

In the event the employe concerned does not request a hearing as provided herein, the Company shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the Brotherhood, unless the Company and the Brotherhood agree otherwise in writing.

(b)—The Company shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the terms of this agreement and shall render a decision within twenty calendar days from

the date that the hearing is closed, and the employe and the Brotherhood shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested.

If the decision is that the employe has not complied with the terms of this agreement, his seniority and employment under the Rules and Working Conditions Agreement shall be terminated within twenty calendar days of the date of said decision except as hereinafter provided or unless the Company and the Brotherhood agree otherwise in writing.

If the decision is not satisfactory to the employe or to the Brotherhood it may be appealed in writing by Registered Mail, Return Receipt Requested, directly to the highest officer of the Company designated to handle appeals under this agreement. Such appeals must be received by such officer within ten calendar days of the date of the decision appealed from and shall operate to stay action on the termination of seniority and employment, until the decision on appeal is rendered. The Company shall promptly notify the other party in writing of any such appeal, by Registered Mail, Return Receipt Requested. The decision on such appeal shall be rendered within twenty calendar days of the date the notice of appeal is received, and the employe and the Brotherhood shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested.

If the decision on such appeal is that the employe has not complied with the terms of this agreement, his seniority and employment under the Rules and the Working Conditions Agreement shall be terminated within twenty calendar days of the date of said decision unless selection of a neutral is requested as provided below, or unless the Company and the Brotherhood agree otherwise in writing. The decision on appeal shall be final and binding unless within ten calendar days from the date of the decision the Brotherhood or the employe involved requests the selec-

tion of a neutral person to decide the dispute as provided in Section 5 (c) below. Any request for selection of a neutral person as provided in Section 5 (c) below shall operate to stay action on the termination of seniority and employment until not more than ten calendar days from the date decision is rendered by the neutral person.

(c)—If within ten calendar days after the date of a decision on appeal by the highest officer of the Company designated to handle appeals under this agreement the Brotherhood or the employe involved requests such highest officer in writing by Registered Mail, Return Receipt Requested, that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the Company designated to handle appeals under this agreement or his designated representative, the Chief Executive of the Brotherhood or his designated representative, and the employe involved or his representative. If they are unable to agree upon the selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The Company, the Brotherhood and the employe involved shall have the right to appear and present evidence at a hearing before such neutral arbitrator. Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties. The Company, the employe, and the Brotherhood shall be promptly advised thereof in writing by Registered Mail, Return Receipt Requested. If the position of the employe is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the Company and the Brotherhood; if the employe's position is not sustained, such fees, salary and expenses shall be borne in equal shares by the Company, the Brotherhood and the employe.

Plaintiffs' Exhibit No. 8

(d)—The time periods specified in this section may be extended in individual cases by written agreement between the Company and the Brotherhood.

(e)—The General Chairman of the Brotherhood shall notify the Company in writing of the title(s) and address(es) of its representatives who are authorized to serve and receive the notices described in this agreement. The Company shall notify the General Chairman of the Brotherhood in writing of the title(s) and address(es) of its representatives who are authorized to receive and serve the notices described in this agreement.

(f)—In computing the time periods specified in this agreement, the date on which a notice is received or decision rendered shall not be counted.

Section 6.—Provisions of investigation and discipline rules contained in the rules and working conditions agreement between the Company and the Brotherhood will not apply to cases arising under this agreement.

Section 7.—Neither this agreement nor any provisions contained therein shall be used in any manner whatsoever as a basis for time or money claims against the Carrier; and no part of the schedule agreement covering rates of pay and working conditions shall be used as a basis for a grievance or time claim by or on behalf of any employe predicated upon an alleged violation, misapplication or non-compliance with any part of this agreement.

Section 8.—In the event that seniority and employment under the Rules and Working Conditions Agreement is terminated by the Company under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, unlawful, or unenforceable, the Brotherhood shall indemnify and save harmless the Company against any and all liability arising as the result of such improper, unlawful,

or unenforceable termination of seniority and employment; provided, however, that this section shall not apply to any case in which the Company involved is the plaintiff or the moving party in the action in which the aforesaid determination is made or in which case the Company aets in collusion with any employe; provided further, that the aforementioned liability shall not extend to the expense to the Company in defending suits by employes whose seniority and employment are terminated by the Company under the provisions of this agreement.

Section 9.—An employe whose seniority and employment is terminated because of alleged non-compliance with the provisions of this agreement and such termination of seniority and employment is subsequently determined to be improper, unlawful or unenforceable, the employe shall be returned to service with seniority rights unimpaired.

Section 10.—An employe whose employment is terminated as a result of non-compliance with the provisions of this agreement shall be regarded as having terminated his employe relationship for vacation purposes.

Section 11. (a)—The carrier party to this agreement shall periodically deduct from the wages of employes subject to this agreement periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in such organization, and shall pay the amount so deducted to such officer of the organization as the organization shall designate: Provided, however, that the requirements of this subsection (a) shall not be effective with respect to any individual employe until he shall have furnished the carrier with a written assignment to the organization of such membership dues, initiation fees and assessments, which assignment shall be revocable in writing after the expiration of one year or upon the termination of this agreement whichever occurs sooner.

Plaintiffs' Exhibit No. 8

(b)—The provisions of subsection (a) of this section shall not become effective unless and until the carrier and the organization shall, as a result of further negotiations, agree upon the terms and conditions under which such provisions shall be applied; such agreement to include, but not be restricted to, the means of making said deductions, the amounts to be deducted, the form, procurement and filing of authorization certificates, the frequency of deductions, the priority of said deductions with other deductions now or hereafter authorized, the payment and distributions of amounts withheld and any other matters pertinent thereto.

Section 12.—This agreement is in full, final and complete settlement of the notice served upon this Company on February 1, 1951, and shall become effective July 1, 1953, and shall remain in full force and effect thereafter until revised or amended in the manner prescribed by the provisions of the Railroad Labor Act, as amended.

Signed at Chicago, Illinois, this 9th day of June, 1953.
For: Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Lines East).

(Signed) C. P. Downing,
Assistant to Vice President.

For the Employes:

(Signed) G. D. Houser
General Chairman—Brotherhood of Railroad Trainmen

Approved:

(Signed) W. M. Dolan
Vice President—Brotherhood of Railroad Trainmen

Plaintiffs' Exhibit No. 8

**Memorandum of Agreement
as between the
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company
(Lines East)
and the
Brotherhood of Railroad Trainmen
Covering Union Shop**

It is agreed that in the application of the Union Shop Agreement signed this date in Chicago, Illinois, that any employe in service on the date of this agreement who is not a member of a union as provided in Section 2 of the Union Shop Agreement and who will make affidavit he was a member of a bona fide and recognized religious group, on the date of this agreement, having scruples against joining a union, will, if he would otherwise be required to join a union under the Union Shop Agreement, be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments to one of the unions as specified in Section 2 of the Union Shop Agreement.

Signed at Chicago, Illinois, this 9th day of June, 1953.

For: Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Lines East).

(Signed) C. P. Downing,
Assistant to Vice President.

For the Employes:

(Signed) G. D. Houser
General Chairman, Brotherhood of Railroad Trainmen

Approved:

(Signed) W. M. Dolan
Vice President—Brotherhood of Railroad Trainmen

PLAINTIFFS' EXHIBIT NO. 9.

Agreement
Between the
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
(Lines East)
and the
Brotherhood of Railroad Trainmen.

This agreement, made this 1st day of February, 1967, by and between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the "Company" (Lines East), and the Brotherhood of Railroad Trainmen, hereinafter referred to as the "Brotherhood", witnesseth:

It Is Agreed:

Section 1.

(a) In accordance with and subject to the terms and conditions hereinafter set forth, all employes of the company now or hereafter subject to the rules and working conditions agreement between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreement, become members of the Brotherhood within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in the Brotherhood; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months.

(b) It is agreed, as a condition of continued employment, all employes of the company shall hold or acquire

membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East) covering employes of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employe from changing membership from one organization to another organization, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East), covering employes of a craft or class in train or yard service; provided further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood.

Section 2.

(a) Every employe covered by the provisions of this agreement shall be considered by the Company to have met the requirements of this agreement, or as having been denied membership in the Brotherhood, unless the Company is advised to the contrary in writing by the Brotherhood.

(b) Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreement.

Section 3.

Employees promoted to official or other positions who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this agreement; provided, that if such employes shall have terminated membership during their occupancy of official or other positions, they shall, within sixty (60) calendar days following date of their return to service represented by this Brotherhood, come under the provisions of Section 1 of this agreement.

Plaintiffs' Exhibit No. 9

Section 4.

Employes furloughed through reduction of force, or absent due to sickness or disability, or leave of absence, who retain and/or accumulate seniority under the provisions of the schedule agreement, will not have such seniority terminated by reason of any of the provisions of this agreement, but shall, within sixty (60) calendar days following date of their resumption of employment, come under Section 1 of this agreement.

Section 5.

The seniority status and rights of employes furloughed to serve in the Armed Forces shall not be terminated by reason of any of the provisions of this agreement, but shall, within sixty (60) calendar days following resumption of employment, come under Section 1 of this agreement.

Section 6.

An employe, retired on disability annuity under the Railroad Retirement Act at an age earlier than 65 and who retains seniority until he reaches age 65, shall not have his seniority status and rights terminated by reason of non-compliance with the provisions of this agreement. If the employe returns to active service, he shall, within sixty (60) calendar days following date of his return, come under Section 1 of this agreement.

Section 7.

Notice of non-compliance with the provisions of Section 1 of this agreement by an individual employe shall be given by Certified Mail by the General Chairman (or designated representative) of the Brotherhood to the Vice President-Labor Relations of the Company not earlier than the expiration of the sixty (60) calendar day period from the date of employment in a craft or class of service covered by this agreement or resumption of employment as contemplated by Sections 3, 4, 5 and 6.

Plaintiffs' Exhibit No. 9

Section 8.

(a) Termination of an employe's seniority rights and employment relationship with the Company due to alleged non-compliance with the provisions of Section 1 of this agreement shall not be made without notice. The Brotherhood will notify the highest officer of the Company designated to handle notices under this agreement, by Certified Mail, of any employe who it is alleged has failed to comply with the provisions of Section 1 of this agreement. Upon receipt of such notice, the Company will, within ten calendar days of such receipt, so notify the employe concerned in writing by Certified Mail, or personal delivery, delivery to be evidenced by a receipt. An employe so notified who disputes the fact that he has failed to comply with the terms of this agreement shall, within a period of ten calendar days from the date of receipt of such notice, request the Company in writing by Certified Mail, or personal delivery, delivery to be evidenced by a receipt, to accord him a hearing. Upon receipt of such request the Company shall set a date for hearing which shall be held within ten calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employe in writing with copy to the Brotherhood by Certified Mail, or personal delivery, delivery to be evidenced by a receipt. The receipt by the Company of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the Company is rendered.

The Company shall determine on the basis of the evidence produced at the hearing whether or not the employe has complied with the provisions of Section 1 of this agreement and shall render a decision within ten calendar days from the date that the hearing is closed, and the employe and the Brotherhood shall be promptly advised thereof in writing, by Certified Mail, or personal delivery, delivery to be evidenced by a receipt.

Plaintiffs' Exhibit No. 9

In the event the employee concerned does not request a hearing as provided herein, the Company shall proceed to terminate his seniority and employment under the Rules and Working Conditions Agreement not later than thirty calendar days from receipt of the above described notice from the Brotherhood, unless the Company and the Brotherhood agree otherwise in writing.

(b) Discipline rule contained in existing agreements between the Company and the Brotherhood will not apply to cases arising under this agreement.

Section 9.

(a) An employe whose service is terminated for noncompliance with the provisions of this agreement, shall be regarded as having terminated his employment relationship, except such termination will not be required to be effected until such time as a qualified replacement is available; however, his position on the roster will be changed to show him as being the youngest employe on the roster.

(b) An employe whose services are terminated in accordance with the provisions of Section 8 hereof shall not thereafter be restored to the carrier's service in any craft or class represented by the Brotherhood except as a new employe or as provided in Section 11 of this agreement.

Section 10.

Nothing in this agreement shall require an employe to become or to remain a member of the Brotherhood if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penal-

ties) uniformly required as a condition of acquiring or retaining membership. For purposes of this agreement, dues, fees, and assessments, shall be deemed to be "uniformly required" if they are required of all employes in the same status at the same time.

Section 11.

(a) If an employe's seniority and employment under the Rules and Working Conditions Agreement is terminated by the Company under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, unlawful, or unenforceable, the Brotherhood shall indemnify and save harmless the Company against any and all liability arising as the result of such improper, unlawful, or unenforceable termination of seniority and employment; provided, however, that this section shall not apply to any case in which the Company involved is the plaintiff or the moving party in the action in which the aforesaid determination is made or in which case the Company acts in collusion with any employe; provided further, that the aforementioned liability shall not extend to the expense to the Company in defending suits by employes whose seniority and employment are terminated by the Company under the provisions of this agreement.

(b) An employe whose seniority and employment is terminated because of alleged non-compliance with the provisions of this agreement and such termination of seniority and employment is subsequently determined to be improper, unlawful or unenforceable, the employe shall be returned to service with seniority rights unimpaired.

Section 12.

(a) In the event the decision reached by the Company on the basis of the hearing held in accordance with the

provisions of Section 8 hereof is not satisfactory to the employe or to the Brotherhood it may be appealed in writing by Certified Mail, Return Receipt Requested, directly to the highest officer of the Company designated to handle appeals under this agreement. Such appeals must be received by such officer within ten calendar days of the date of the decision appealed from and shall operate to stay action on the termination of seniority and employment, until the decision on appeal is rendered. The Company shall promptly notify the other party in writing of any such appeal by Certified Mail, Return Receipt Requested. The decision on such appeal shall be rendered within ten calendar days of the date the notice is received, and the employe and the Brotherhood shall be promptly advised thereof in writing by Certified Mail, Return Receipt Requested.

(b) If the decision on such appeal is that the employe has not complied with the terms of this agreement, his seniority and employment under the rules and working conditions agreement shall be terminated within ten calendar days of the date of said decision unless selection of a neutral is requested as provided below, or unless the Company and the Brotherhood agree otherwise in writing. The decision on appeal shall be final and binding unless within ten calendar days from the date of the decision the Brotherhood or the employe involved requests the selection of a neutral person to decide the dispute as provided in Section 12 (c) below. Any request for the selection of a neutral person, as provided in Section 12 (c) below, shall operate to stay action on the termination of seniority and employment until not more than ten calendar days from the date decision is rendered by the neutral person, except, however, in a case where the selection of a neutral is requested by the employe, beginning within ten calendar days of the date of the carrier's decision on appeal, and

continuing until decision is rendered by the neutral person, his position on the roster will be changed to show him as being the youngest employe on the roster.

(c) If within ten calendar days after the date of a decision on appeal by the highest officer of the Company designated to handle appeals under this agreement the Brotherhood or the employe involved requests such highest officer in writing by Certified Mail, Return Receipt Requested, that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the Company designated to handle appeals under this agreement or his designated representative, the Chief Executive of the Brotherhood or his designated representative, and the employe involved or his representative. If they are unable to agree upon the selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The Company, the Brotherhood and the employe involved shall have the right to appear and present evidence at a hearing before such neutral arbitrator. Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties. The Company, the employe and the Brotherhood shall be promptly advised thereof in writing by Certified Mail, Return Receipt Requested. If the position of the employe is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the Company and the Brotherhood; if the employe's position is not sustained, such fees, salary and expenses shall be borne in equal share by the Company, the Brotherhood and the employe.

(d) The time periods specified in this section may be extended in individual cases by written agreement between the Company and the Brotherhood.

Plaintiffs' Exhibit No. 9

(e) In computing the time periods specified in this agreement, the date on which a notice is received or decision rendered shall not be counted.

Section 13.

No part of this agreement shall be used in any manner whatsoever as a basis for a grievance or time claim by or on behalf of any employe; and no part of the schedule agreement covering rates of pay and working conditions shall be used as a basis for a grievance or time claim by or on behalf of any employe predicated upon an alleged violation, misapplication or non-compliance with any part of this agreement.

Section 14.

This agreement is in full and final settlement of the Section 6 notices dated November 16, 1966 and December 14, 1966, served on this carrier by the BRT, and carrier's counterproposals dated November 25, 1966. This agreement, which supersedes the Union Shop Agreement dated June 9, 1953, shall become effective March 1, 1967, and will remain in effect until revised or cancelled in accordance with the provisions of the Railway Labor Act, as amended.

For The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Lines East),

(Signed) S. W. Amour,
Vice President-Labor Relations.

For the Employes:

(Signed) E. L. Dirks,
General Chairman,
Brotherhood of Railroad Trainmen.

Plaintiffs' Exhibit No. 9

Agreement
Between The
Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Lines East),
And The
Brotherhood of Railroad Trainmen.

It is agreed that in the application of the Union Shop Agreement signed this date in Chicago, Illinois, that any employe in service on the date of this agreement who is not a member of a union as provided in Section 1 of the Union Shop Agreement and who will make affidavit he was a member of a bona fide and recognized religious group, on the date of this agreement, having scruples against joining a union, will, if he would otherwise be required to join a union under the Union Shop Agreement, be deemed to have met the requirements of the Union Shop Agreement, if he agrees to and does pay initiation fees, periodic dues and assessments to one of the unions as specified in Section 1 of the Union Shop Agreement.

Signed at Chicago, Illinois, this 1st day of February, 1967.

For The Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Lines East),

(Signed) S. W. Amour,
Vice President-Labor Relations.

For the Employes:

(Signed) E. L. Dirks,
General Chairman—BRT.

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

W. L. Birkholz, Ray Granger, Thomas Foley, David Tucibat, Wayne Blackburn and Marvin Hoisington, individually and in behalf of all members of the Switchmen's Union of North America, AFL-CIO, who are employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Switchmen's Union of North America, AFL-CIO, an unincorporated association, *Plaintiffs,* *vs.* Elmer L. Dirks, individually and as General Chairman of the Brotherhood of Railroad Trainmen, an unincorporated association, Charles Luna, L. E. Chester, and W. E. B. Chase, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, *Defendants.*	Civil Action. No. 67-C-285.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

1. Defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Carrier") and Brotherhood of Railroad Trainmen, AFL-CIO ("Trainmen") are respectively

a carrier and the representative of its yard service employees under the Railway Labor Act, 45 U. S. C. § 151 (Complaint, ¶ 11; Plaintiffs' Exhibit No. 5). Defendant Elmer L. Dirks is General Chairman of the General Grievance Committee maintained by the Trainmen for the Carrier's Lines East (Complaint, ¶ 9).

2. The Trainmen, through its General Grievance Committee, is party to collective bargaining agreements with the Carrier setting forth rates of pay, rules, and working conditions for all yardmen employed on Lines East (Tr. 75-76). The activities of the General Grievance Committee receive direct financial support only from the membership of the Trainmen (Tr. 76-77, 83-84).

3. Both plaintiff Switchmen's Union of North America, AFL-CIO ("SUNA") and the Trainmen are among the five "standard" operating organizations qualified to select or designate members of the National Railroad Adjustment Board, First Division, as provided in Section 3 of the Railway Labor Act, 45 U. S. C. § 153 (Complaint, ¶ 8; Tr. 37, 106). On November 14, 1966, under the terms of the union shop agreement then in effect between the Trainmen and the Carrier, a number of yardmen in the bargaining unit represented by the Trainmen, including the five individual plaintiffs, held membership in SUNA (Tr. 34, 85).

4. On February 1, 1967, the Trainmen and the Carrier modified their union shop agreement to provide, in relevant part, as follows:

> "Section 1 (b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad

Company (Lines East) covering employees of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employee from changing membership from one organization to another organization, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East), covering employees of a craft or class in train or yard service; provided further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood." (Plaintiffs' Exhibit No. 9.)

The effect of the changes was to require membership in the Trainmen for all yardmen except those holding employment rights in another craft or class and to limit alternate membership for such persons to organizations having a labor agreement with the Carrier covering employees in its train or yard service.

5. SUNA has no labor agreement with the Carrier, does not negotiate basic labor agreements with the Carrier, and has never been certified or recognized as the representative of any employees of the Carrier at any time since passage of the Railway Labor Act in 1926 (Tr. 74-75, 79, 80, 124; Complaint, ¶ 14). Membership in SUNA will not satisfy the obligations imposed upon yardmen by the February 1, 1967, union shop agreement.

6. SUNA and the Trainmen help finance activities of the Railway Labor Executives Association, a private organization of the presidents of the "standard" railroad labor unions to formulate and sponsor national legislative and policy programs of common concern (Tr. 25, 26, 116). Both organizations have represented their respective memberships on various boards and committees and have participated in certain litigation of interest to railroad labor generally and, on occasion, in the negotiation of

particular agreements affecting employees on all Class I railroads (Tr. 27, 31, 32, 33, 34, 83-84, 117-118, 124, 128-129).

7. In several instances, SUNA has chosen to process cases under the Trainmens' collective agreements before designated officers of the Carrier and before the National Railroad Adjustment Board for individual members of SUNA whom the Trainmen would otherwise represent (Tr. 76-78, 79, 114-115, 125). However, on the record as a whole, the Court finds that SUNA members employed by the Carrier do not contribute a full share of financial support to the General Grievance Committee of the Trainmen for the performance of its functions under the Railway Labor Act.

8. On November 14, 1966, SUNA applied to the National Mediation Board for a representation election among yardmen employed on the eastern and western lines of the Carrier, but no such election has been ordered or scheduled by the Board (Plaintiffs' Exhibits Nos. 4, 5 and 6; Tr. 58). SUNA is competing with the Trainmen for allegiance of the yardmen and seeks to supplant the Trainmen as their statutory bargaining representative (Plaintiffs' Exhibit No. 7).

9. Although the February 1, 1967 union shop agreement applied only to Lines East of the Carrier and the Lines West agreement does not prohibit SUNA membership, SUNA's application for an election encompassed both the eastern and western lines (Tr. 99-103). The evidence does not demonstrate that the defendants modified their union shop agreement for the purpose of influencing the outcome of any election that the National Mediation Board may conduct.

Conclusions of Law.

1. This Court has jurisdiction under the Railway Labor Act, 45 U. S. C. § 151, et seq., and 28 U. S. C. 1337, to determine the validity of union shop agreements.

2. This Court has jurisdiction to determine whether the union shop agreement of February 1, 1967 was entered into by defendants for the purpose of influencing the outcome of a representation election to be conducted by the National Mediation Board. Since the charge involves a dispute between certain employees of the Carrier and their bargaining representative, it is within the jurisdiction of this Court, joinder of the Carrier notwithstanding. *Rumbaugh v. Winifrede Railroad Co.*, 331 F. 2d 530, 535-536, 538 (4th Cir. 1964), Sobeloff, C. J., *cert. denied,* 379 U. S. 929 (1964).

3. The provisions of Section 2, Eleventh, of the Railway Labor Act, 45 U. S. C. 152, Eleventh, authorize carriers and the representatives of their employees to enter into union shop agreements requiring employees within the craft or class represented to become and to remain members of the bargaining representative as a condition of employment.

4. The 1951 union shop amendments to the Railway Labor Act, 45 U. S. C. § 2, Eleventh, were enacted in order that defendants could contract for "the elimination of the 'free rider' who did not support his representative's performance of its functions under the Act." *International Association of Machinists v. Street,* 367 U. S. 740, 763-64 (1961). It is the statutory representative of the craft or class, in this case the Trainmen, that was the object of Congressional concern. SUNA is without obligations under the Railway Labor Act to employees of the Carrier.

5. The language of Section 2, Eleventh (c) which permits alternative union membership for operating em-

ployees in an organization national in scope and organized in accordance with the Act, cannot be literally applied but must be limited in its scope by construction in light of the policy it was intended to serve. "The only purpose of Section 2, Eleventh (c) was a very narrow one—to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Pennsylvania Railroad Co. v. Rychlik,* 352 U. S. 480, 492 (1957).

6. The February 1, 1967, union shop agreement adequately meets the narrow problem of intercraft mobility by permitting alternative membership for yardmen holding employment rights in another craft or class, namely those with interchangeable rights, and in unions that have contracts with the Carrier covering the other craft or class involved.

7. It was not the purpose of Congress in Section 2, Eleventh (c), "to help dissident or rising new unions recruit new members" or to permit "employees to choose between membership in (their bargaining representative) and another competing union". *Pennsylvania Railroad Co. v. Rychlik,* 352 U. S. 480, 488-489, 494 (1957). SUNA, a rival organization without a labor agreement covering a craft or class to which yardmen employed by the Carrier may be transferred, is not within the intendment of the statute.

8. The fact that SUNA, like the Trainmen, is qualified to select or designate members of the National Railroad Adjustment Board or participates in other activities of concern to railroad labor generally does not bring SUNA or its members within the alternative union protections of Section 2, Eleventh (c) in the absence of a showing that they face the problem of intercraft mobility. *Rohrer v. Conemaugh & Black Lick Railroad Co.,* 359 F. 2d 127 (3rd Cir. 1966).

9. Since the February 1, 1967 union shop agreement is lawful, its execution and enforcement do not constitute unlawful coercion, interference or influence under Section 2 of the Railway Labor Act, 45 U. S. C. § 152.

10. Defendants have not violated any of the provisions of the Railway Labor Act.

11. The issues in this case are found against the plaintiffs and for the defendants and plaintiffs are not entitled to relief or any part thereof they pray for in their Complaint. The plaintiffs have failed to show any irreparable injury or that they have sustained any damages, the defendants not having been shown to have violated, or to have threatened to violate, the Railway Labor Act.

12. The complaint as to the several defendants must be dismissed in its entirety on the merits with costs.

Julius J. Hoffman,
United States District Judge.

Dated: May 24, 1967.

Judgment Order

IN THE UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

W. L. Birkholz, Ray Granger, Thomas Foley, David Tucibat, Wayne Blackburn and Marvin Hoisington, individually and in behalf of all members of the Switchmen's Union of North America, AFL-CIO, who are employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Switchmen's Union of North America, AFL-CIO, an unincorporated association,
Plaintiffs,

vs.

Elmer L. Dirks, individually and as General Chairman of the Brotherhood of Railroad Trainmen, an unincorporated association, Charles Luna, L. E. Chester, and W. E. B. Chase, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation,
Defendants.

Civil Action.
No. 67-C-285.

JUDGMENT ORDER.

This cause coming on to be heard on the Verified Complaint of Plaintiffs filed on February 23, 1967 and on the Verified Answers of the Defendants; and

It appearing that a Temporary Restraining Order was denied after arguments on February 23, 1967; and

This cause having been heard on the merits on the said Complaint and Answers on April 3 and 4, 1967, and the

Court having heard the testimony proffered by the Plaintiffs and having considered the written evidence offered by the Plaintiffs and having considered the Motions to Dismiss the Complaint by each of the Defendants, and having heard the arguments of counsel and being fully advised in the premises; and

The Court having tried this action upon the facts without a jury and having heretofore found the facts specially, and having heretofore stated separately its Conclusions of Law thereon and having directed the entry of an appropriate Judgment;

It Is Hereby Ordered, Adjudged and Decreed that the Complaint herein be and the same is hereby dismissed and that the Plaintiffs do have and recover nothing from the Defendants by reason of this action against said Defendants; that said action be and the same is hereby dismissed on the merits and that said Defendants do have and recover of and from said Plaintiffs their costs in this action.

Julius J. Hoffman,
United States District Judge.

Dated: May 24, 1967.

IN THE UNITED STATES DISTRICT COURT.

* * (Caption 67 C 285.) * *

(Title Omitted in Printing.)

NOTICE OF APPEAL.

Notice is hereby given that W. L. Birkholz, Ray Granger, Thomas Foley, David Tucibat, Wayne Blackburn and Marvin Hoisington, individually and in behalf of all members of the Switchmen's Union of North America, AFL-CIO, who are employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Switchmen's Union of North America, AFL-CIO, an unincorporated association,

the plaintiffs above named, and each and all of them, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the denial of plaintiffs' Motion for a Preliminary Injunction, and the Findings of Fact, Conclusions of Law, and Judgment Order of District Judge Julius J. Hoffman dated May 24, 1967, dismissing plaintiffs' complaint.

Lee Leibik,
Ruth Weyand,
Attorney for Plaintiffs,
343 South Dearborn Street,
Chicago, Illinois 60604,
WAbash 2-0677.

OPINION.

In the
United States Court of Appeals
For the Seventh Circuit.

No. 16,340 September Term, 1967 September Session, 1967.

W. L. Birkholz, *et al.*,
Plaintiffs-Appellants,
v.
Elmer L. Dirks, *etc., et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 12, 1968.

Before Schnackenberg, Kiley and Swygert, *Circuit Judges.*

Kiley, *Circuit Judge.* The Switchmen's Union of North America (SUNA) and six of its members sued, individu-

ally and as representatives of all members of SUNA who are yard service employees on the Milwaukee, St. Paul, and Pacific Railroad (Milwaukee), seeking a judgment declaring the union shop agreement between the Milwaukee and the Brotherhood of Railroad Trainmen (Trainmen) void, and seeking damages and injunctive relief. The district court after a hearing dismissed the suit and SUNA and the representative employees appeal. We reverse.

The Trainmen's Union has, since the 1926 adoption of the Railway Labor Act, served as bargaining agent for the Milwaukee's yard service employees. Both SUNA and the Trainmen are among the five national operating craft unions represented on the National Railroad Adjustment Board under Sec. 153 (h) of the Railway Labor Act, 45 U. S. C. Since the Trainmen's Union has been the bargaining agent, some yard service employees have held cards in SUNA rather than in the Trainmen.

On November 14, 1966, SUNA filed a petition before the National Mediation Board for a representative election seeking certification as bargaining agent for all yard service employees of the Milwaukee. Two days later the Trainmen served notice on the Milwaukee for modification of the existing agreement, made in 1953. On February 1, 1967, the agreement was modified by adding the union shop amendment in dispute.[1] SUNA then brought this

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[1] Section 1.

(a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *

(b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East) covering em-

suit to void the amendment on the ground that it violated Section 2 Eleventh (c) of the Railway Labor Act.[2]

The district court in dismissing SUNA's complaint decided that the Milwaukee and Trainmen could contract to require members of SUNA to join the Trainmen despite the language of 2 Eleventh (c) because SUNA did not support the bargaining agreement's grievance committee,

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ployees of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employees from changing membership from one organization to another labor organization, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East), covering employees of a craft or class in train or yard service; provided, further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood.

[2] (c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of Section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

and had no obligation to the Milwaukee employees; and because the court was persuaded by defendant's argument that 2 Eleventh (c) must be restrictively interpreted to permit the type of union shop clause in the Trainmen's contract because the only purpose of 2 Eleventh (c) was to prevent an employee who temporarily changed crafts from being required to change unions and the contract provision fulfills this purpose. The court relied upon *Pennsylvania R. Co. v. Rychlik,* 352 U. S. 480, 492, and *Rohrer v. Conemaugh & Black Lick R. R. Co.,* 359 F. 2d 127.

The Trainmen and Milwaukee concede that their union shop clause violates Sec. 2 Eleventh (c) of the Railway Labor Act if that section is read literally. We agree. Par. (c) qualifies the right to enter into a union shop agreement given under Par. (a).[3] Under Par. (c) the membership requirement of the union shop clause must be satisfied as to employees "in engine, train, yard or hostling service" by membership in any union "national in scope, organized in accordance with the Act" which admits to membership any employee in a craft covering any of the services designated. It is plain that under the literal language of Par. (c) any requirement of membership in the Trainmen's Union negotiated under Par. (a) would have to permit alternative membership in SUNA since SUNA admits yard service employees to membership, and is, as the district court found, "national in scope and organized in accordance with the Act."

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[3] . . . any carrier . . . and a labor organization . . . shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class:

* * * * * * *

The union shop agreement signed by the Milwaukee and the Trainmen does not permit yard service employees to maintain alternate membership in SUNA. Under the agreement all operating craft employees must belong to the Trainmen unless they belong to another union which is national in scope and has a contract with the Milwaukee and unless the particular yardman concerned has interchangeable rights, *i. e.*, the right to be employed in another craft in addition to yard service. Thus the contract requires two conditions, in addition to the national in scope requirement of the Act, before alternate union membership is permissible. Under this agreement a yard service employee's membership in SUNA cannot serve as a substitute for membership in the Trainmen since SUNA has no contract with the Milwaukee and since most yard service employees do not have interchangeable rights.

The vital issue before us is whether Sec. 2 Eleventh (c) renders the February 1, 1967 union shop clause of defendants' agreement void. We think that the literal reading of Sec. 2 Eleventh (c) expresses the intention of Congress as demonstrated by the legislative history of the Act.

The legislative background of Sec. 2 Eleventh (c) is well known. In 1934 Congress, in an effort to combat company dominated unions which were then prevalent on railroads, outlawed the union shop. In 1951, however, railway labor organizations sought the authorization of union shop agreements. Congress was agreeable to authorizing the union shop but in hearings encountered the problem of intercraft mobility. Operating employees organized along craft lines frequently changed crafts either through temporary promotions or demotions as the railroad's needs for workers of a particular craft dictated. An employee who worked in one craft and belonged to his craft union might, for example, upon being promoted to another craft be required by a union shop

agreement to belong to the union which represented the new craft to which he had been temporarily promoted. He would then be faced with the choice of either maintaining dual union membership or of quitting his old union and perhaps sacrificing interests in pensions and other benefits under his original craft membership. The problem of intercraft mobility could also affect union members who have no interchangeable rights in another craft. The union to which these members belong might lose its majority to another craft union whose members have interchangeable rights with the first craft and are transferred into that craft. The craft union whose members had interchangeable rights could then negotiate a union shop agreement requiring the employee in the first craft to quit his now minority union or maintain dual union membership.

The evil of placing upon the operating employee the choice of maintaining dual union membership or of quitting his old union was recognized by Congress at the time proposals for authorizing the union shop were being considered. Three proposals for preventing this evil and solving the problem of intercraft relationships among operating employees were considered. The first proposal was aimed at protecting employees from denial of membership in the bargaining union because of membership in another union. This would have protected, for example, a member of the firemen's union from being denied membership in the engineers' union and thereby being denied work in a unit represented by the engineers. All operating unions objected to this proposal because it would not eliminate the choice of maintaining dual union membership or of quitting the union the employee had belonged to in the past.

The second solution was presented by the Trainmen. Under this proposal the union membership requirement

authorized by Sec. 2 Eleventh (a) could be satisfied with respect to closely related crafts where the employee held employment rights in more than one, or promotional rights from one, to another, by membership in the craft union which represents the employees in any craft in which he is entitled to work. In other words, the employee member of one of the five crafts could satisfy the membership requirement only by membership in the union that is the bargaining agent for the craft in which he is working or in a union that is the bargaining agent for another craft in which he is also entitled to work.

This second proposal would have provided the identical amount of protection for minority union members as does the contract entered into by the Trainmen and the Milwaukee and as would Sec. 2 Eleventh (c) if interpreted in the manner urged by the Trainmen. The Trainmen's proposal was rejected by Congress. While it is clear that the Trainmen's proposal would adequately protect the employee who was transferred from one craft to another and did not wish to give up membership in the union which represented his original craft, the proposal would offer no protection to the operating craft employee whose union became a minority union due to an influx of transferees from another craft, nor would the proposal give recognition to the operating craft tradition of permitting membership in minority unions.

The third proposal was a prohibition against requiring membership in more than one labor organization. This would have permitted an employee represented by an operating craft union to maintain membership in a non-operating union despite the existence of a union shop agreement.

The union shop bill as reported to the Senate contained the third proposal outlined above and because of this was opposed by the Trainmen and three other operating broth-

erhoods. The Senate postponed consideration of the bill to enable the four brotherhoods to produce a compromise proposal which they could all support. The result was the present language of Sec. 2 Eleventh (c) which was approved by the four brotherhoods and which was ultimately incorporated in the Act.

In the light of this legislative history we must reject the restrictive interpretation of Sec. 2 Eleventh (c) which the Trainmen urged unsuccessfully upon the Senate Committee and now urge upon us. We hold that the union shop provision of the collective bargaining agreement before us is violative of Sec. 2 Eleventh (c) properly interpreted.

We think it would be absurd to interpret away the literal language of 2 Eleventh (c) by reading it as though it said almost exactly what was said in a proposal which was rejected at committee hearings and which places members of SUNA—organized under the Act and national in scope and covering the craft of yard services—in the dilemma of choosing between compulsory dual unionism or a compulsory change from their own craft union to the Trainmen. Each horn of this dilemma was rejected by Congress in 1950. If Congress had intended to limit the protection afforded by 2 Eleventh (c) in the manner urged by the Trainmen they would have used the explicit language which the Trainmen had suggested to them. Moreover it must be remembered that the actual language of 2 Eleventh (c) was drafted by four operating brotherhoods including the Trainmen, and had these brotherhoods agreed that it was desirable to limit the scope of 2 Eleventh (c) as the Trainmen wished, they would have adopted the explicit language previously proposed by the Trainmen.

Moreover, if the interpretation of 2 Eleventh (c) urged by the Trainmen were adopted the result would be to

render the second proviso of 2 Eleventh (c) devoid of any meaning. The second proviso states that "nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services." The Trainmen's contract prevents craft employees from switching from the Trainmen to other operating craft unions.

We are impressed with the reasoning of Judge Herlands of the Southern District of New York in his opinion in *O'Connell et al. v. Erie Lackawanna Railroad Co. et al.*, 65 L. R. R. M. 2372. Judge Herlands rejected the argument of the Trainmen there that Sec. 2 Eleventh (c) should not be construed to make a union shop provision requiring members of other operating craft unions to join the Trainmen unlawful, where the men concerned did not have interchangeable rights. Judge Herlands pointed out the difficulties that would follow upon an insistence that Congress, even though it did not express it, intended the validity of a union shop agreement to depend on the interchangeable rights of each employee in the majority and minority unions involved. The result, as Judge Herlands stated, would be that each member of a majority union who is within the jurisdiction of a bargaining contract would be faced with the necessity of proving rights in another craft, and as a result federal courts might be called upon to make ad hoc adjudications in a large number of individual cases. Judge Herlands pointed out several practical problems which would be encountered in making these determinations. One reason that Sec. 2 Eleventh (c) was drafted as it was may well have been to avoid such problems.

We also consider the contemporaneous interpretation of this Section by the operating craft brotherhoods significant in determining its proper interpretation, since they

themselves drafted the Section to meet their own needs. It is undisputed that for fifteen years after the passage of the Act all union shop agreements entered into by standard operating unions, including the Trainmen, contained the exact literal language of Sec. 2 Eleventh (c) and that that language was interpreted to permit alternate membership in any standard operating craft union. The Trainmen's position would suggest that the drafters of 2 Eleventh (c), including itself, did not know what the Section meant and have been misapplying it for fifteen years. This position is inherently unpersuasive especially when it is recognized that the interpretation now urged would change the law to conform to the proposal which the Trainmen unsuccessfully advocated before Congress at the time the Section was enacted.

The fifteen year practice of allowing membership in any standard operating craft union to satisfy union shop agreements also militates strongly against the Trainmen's argument that the elimination of minority representation would promote peace between unions. It is difficult to see how labor peace would be promoted by abrogating what is, in effect, an agreement between the operating brotherhoods which has guided their relations for fifteen years.

We believe that the railroad unions responsible for Sec. 2 Eleventh (c), and Congress, deliberately chose to avoid the dangers of dual unionism by the method outlined in the literal language of Sec. 2 Eleventh (c) in order to provide clear and unequivocal protection from compulsory dual union membership, and also to avoid upsetting the balance of union power between the majority union bargaining agent and substantial minority union members within the bargaining unit.

We do not find *Pennsylvania R. Co. v. Rychlik*, 352 U. S. 480, to be inconsistent with our conclusion that

membership in SUNA must satisfy any union membership requirement negotiated by the Trainmen with the Milwaukee. The holding in *Rychlik* is that Sec. 2 Eleventh (c) of the Act makes only unions already qualified as electors for the labor members of the National Railroad Adjustment Board under Sec. 3 First, available for alternate membership under a union shop agreement. The plaintiff there had resigned from the Trainmen's Union and joined UROC, a rising competing union. The Trainmen requested the railroad to discharge Rychlik and this was done. UROC, however, was not a union national in scope eligible to elect members to the NRAB. What the Supreme Court said in dictum in that case was with respect to that factual situation.

The Trainmen also rely on *Rohrer v. Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127, but the holding there was that Sec. 2 Eleventh (c) does not apply at all to a railroad which is wholly owned by a steel company, which is not organized according to crafts, and all of whose employees are represented by the United Steel Workers Union. The Trainmen cite no case where a union shop agreement negotiated by one of the five national operating craft unions was permitted to bar an employee from belonging to another national operating craft union as an alternative to belonging to the bargaining union.

We therefore reverse the judgment of the district court and remand for further proceedings consistent with the views expressed in this opinion.

JUDGMENT.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Monday, February 12, 1968.

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge.

W. L. Birkholz et al.,
Plaintiffs-Appellants,

No. 16340. vs.

Elmer L. Dirks, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby Remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court filed this day.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD B. ELKIND
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New York, N. Y. 10017
122 East 42nd Street

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ..... Misc.

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Brotherhood of Railroad Trainmen, an unincorporated association, and Griff Davis, individually and as

General Chairman of the Brotherhood of Railroad Trainmen, and W. J. Weil, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, Petitioners, pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit affirming a judgment in favor of the Respondents entered on March 5, 1968.

Opinions Below

On April 27, 1967, the Petitioners were temporarily enjoined by the United States District Court for the Southern District of New York (Herlands, J.) from enforcing the terms of a union security agreement entered into between the Petitioners and the Erie Lackawanna Railroad (268 F. Supp. 397) [Appendix "A" *infra*].

The United States District Court for the Southern District of New York granted Respondents' motions for summary judgment, denied Petitioners' cross-motions for summary judgment, and entered judgment for Respondents on Petitioners' counterclaim. The opinion of Judge Palmieri is dated July 25, 1967 [Appendix "B" *infra*], and judgment was entered thereon in the office of the Clerk of the United States District Court for the Southern District of New York on the 29th day of August, 1967.

On March 5, 1968 the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court (391 F.2d 156) [Appendix "C" *infra*].

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254. The jurisdiction of the lower Court was based upon 28 U.S.C. 1337 and the Declaratory Judgment Act, 28 U.S.C. 2201.

Question Presented

1. Whether train service employees may be required by a labor-management agreement to financially support a collective bargaining agent bearing the exclusive duty to represent said employees in all prospective crafts of train service?

Statutes Involved

Section 2, Eleventh of the Railway Labor Act (45 U.S.C. 152 Eleventh) [Appendix "D" *infra*].

Statement of the Case

Representing, for all practical purposes, all train service employees of the Erie Lackawanna Railroad, the Petitioners negotiated and executed agreements with the Erie Lackawanna Railroad which, pursuant to Section 2, Eleventh (a) (45 U.S.C. 152 Eleventh (a)) of the Railway Labor Act, required employees to become members of the Brotherhood. While all statutory safeguards mandated in order to prevent discrimination were included in the union security agreements, the parties omitted to include a provision which would give the option to employees to satisfy their union shop obligation by paying dues to any other union.

The omission was based on the teaching of this Court in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 492 to 494, which gave the rationale for permitting alternative union shop membership to operating railroad employees, and the decision of the United States Court of Appeals for the Third Circuit, through which the railroad operates, in *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (1966).

The dicta in the *Rychlik* case and the holding in the *Rohrer* case were to the effect that the sole purpose of subdivision (c) of Section 2, Eleventh of the Railway Labor Act[1] was to prevent the imposition of compulsory dual unionism on operating employees who are traditionally exposed to seasonal intercraft transfers. Since, as in the *Rohrer* case, it was manifest that none of the employees could be involved in intercraft transfers, the legislative *raison d'etre* for the inclusion of the subdivision (c)[1] license was absent. The parties therefore omitted to furnish a contractual license to support a stranger to collective bargaining on the Erie Lackawanna Railroad in lieu of the agent charged with obligations to bargain on behalf of all the employees. (*Steele* v. *L. & N. R.R. Co.*, 323 U.S. 192; *Turnstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210; *Brotherhood of Sleeping Car Porters* v. *Thompson*, 367 F.2d 489 [4th Cir.]).

The Respondents are employees of the Erie Lackawanna Railroad who successfully insisted below that subdivision (c) of Section 2, Eleventh[1] conferred upon them a right to satisfy their union shop obligation by paying dues to a rival organization. They successfully insisted that any union security agreement must spell out *in haec verba* the alleged right not to belong to or support the union which renders them service as collective bargaining agent.

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[1] 45 U.S.C. 152, Eleventh (c).

Reasons for Granting the Writ

The decision and opinions in this case are in direct conflict with the decision and opinion of the Court of Appeals for the Third Circuit in *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127. The Court of Appeals in the Seventh Circuit, in *Birkholz, et al.* v. *Dirks, et al.*, 391 F.2d 289, has also held in substance that subdivision (c) of paragraph Eleventh of Section 2[1] is an inflexible mandate to incorporate the provision permitting alternative union shop membership in every union security agreement involving operating trainmen. A Petition for a Writ of Certiorari in the *Birkholz* case is being presented to this Court so that this question of vital concern to the railroad industry can be finally resolved.

The Court should also grant the Writ because the philosophy expressed by the interpretation is at war with a coherent national labor policy,[2] not only for industry generally, but for the balance of the railroad industry as well. The strict interpretation given Section Eleventh (c)[1] by the Court of Appeals in the Second and Seventh Circuits carved out one segment, indeed a critical segment, of the American economy for special adverse treatment. It substituted for the equitable concept of compelling financial support to the agent performing valuable services to employees, as expressed in *International Association of Machinists* v. *Street*, 367 U.S. 739, 760, 764 (1951), a logically and morally insupportable dogma. The dogma of amplifying the Railway Labor Act so as to insist on blindly including the language of subdivision (c) of paragraph Elev-

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[2] *National Woodworkers Association* v. *Labor Board*, 386 U.S. 612; *Local 1976, Carpenters Union* v. *Labor Board*, 357 U.S. 93, 99, 100; *N.L.R.B.* v. *Allis Chalmers Manufacturing Co., Inc.*, 388 U.S. 175.

enth, Section 2,[1] in all agreements means that carriers must always afford competing unions in the operating sector of the railroad industry the opportunity to usurp the role of collective bargaining agent. The Federal Government therefore underwrites instability in labor-management relations as a matter of national policy in a critical sector of the economy. This strict interpretation therefore tends to conflict with the general purposes of the Railway Labor Act. (45 U.S.C. 151a (1), (4) (5); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40.)

Grossly stated, the legislative history of the 1951 Amendment[3] demonstrates an intention to grant the privilege of the union shop, which had been found to be effective and salutary in industry generally, to the railroad industry. It was only to meet a special operational characteristic idiosyncratic to Engineers and Firemen and to Conductors and Brakemen, that any deviation from the remedial purpose of authorizing union shops was even considered by Congress. Eleventh (c)[1] represented the solution of a pragmatic problem. Eleventh (c)[1] never was intended to express a philosophical rejection of the union shop authorization or to provide a legislative basis to deny the benefits of the strict union shop in those situations where the operational idiosyncracy did not and could not exist.

The operational idiosyncracy is that there is from time to time a changing of an employee from one craft to another on a seasonal basis, after which he returns to his

[3] Report No. 2262, 81st Cong., 2nd Sess.; Report No. 2811, 81st Cong., 2nd Sess.; Hearings before the Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789; 96 Congressional Record 15736, 16261, 16268, 16328, 17055.

craft. The legislative history demonstrates a behind-the-scenes search for a formula that would permit intercraft transfers, where the need existed, without imposing on the employees thus involved the obligations of supporting two collective bargaining agents. The formula selected was intended to permit *only* those categories of employees involved in the problems of intercraft transfers to satisfy their union membership requirement by belonging to any union organized under the Railway Labor Act which was national in scope.

Implicit though unexpressed was the understanding that the purpose of permitting such alternative union membership was to permit freedom for the intercraft transfer. (*Rychlik, supra*). Nowhere in the legislative history can there be found any suggestion of an intent to confirm competitive unionism as an instrument of national labor policy.

When a union, such as the Brotherhood of Railroad Trainmen, one of the Petitioners herein, is authorized to contract for all of the train service employees on a particular railroad so that men may readily transfer from craft to craft without being exposed to any need to join another union, the pragmatic reason for incorporating the alternative union shop license is absent. If there is no useful purpose to be served by incorporating the language of Eleventh (c)[1] in the union security agreement, and if there is no *bona fide* philosophical or policy reason for incorporating such language in the agreement, the parties to a collective bargaining agreement should be free to enter into a strict union shop contract just as all other unions can do in the railroad industry and in industry generally.

Obviously, a union without responsibilities is free to charge cut rate dues and it is free to conduct the role of the spoiler in union-management relations. Hence it be-

comes virtually impossible to achieve long range stabilization of labor-management relations when financial support for dissident unionism is underwritten by a statutory interpretation.

Petitioners insist that the 1951 Amendment means that authorizations for union shop agreements were envisioned for the railroad industry on an individual carrier basis; that is, that *a* railroad would agree with *a* union that *a* collective bargaining agreement could include a union security clause. That union security clause must, of necessity, include the language of Section 2, Eleventh (c)[1] if its crafts of operating train service employees are represented by more than one union as an authorized collective bargaining agent. On those railroads, however, where the union is an industrial union as on the Conemaugh & Black Lick Railroad in *Rohrer, supra,* and in those situations where the union is a virtual industrial union for all train service employees, as is the case on the Erie Lackawanna Railroad, Congress did not intend that the language of subdivision (c)[1] be required.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ARNOLD B. ELKIND
Attorney for Petitioners
122 East 42nd Street
New York, N. Y. 10017

Proof of Service

I, ARNOLD B. ELKIND, Attorney for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served a copy of the foregoing Petition for Writ of Certiorari on Lee Leibik and Ruth Weyand, Attorneys for Respondents, by mailing a copy thereof, postage pre-paid, addressed to their office at 343 South Dearborn Street, Chicago, Illinois 60604.

Dated this 3rd day of June, 1968.

.....

APPENDICES

APPENDIX "A"

(R. 131-154)

Opinion by Herlands, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

STURM & PERL, ESQS., (New York)
ALAN F. PERL, *of Counsel*

—and—

LEE LEIBIK and RUTH WEYAND, ESQS., (Chicago)
LEE LEIBIK and RUTH WEYAND, *of Counsel,*
Attorneys for Plaintiffs.

RAYMOND H. BRANDA, ESQ., (New York)
Attorney for Defendant Erie Lackawanna RR Co.

ARNOLD B. ELKIND, ESQ., (New York)
Attorney for Defendants Brotherhood of Railroad Trainmen and W. J. Weil, individually.

HERLANDS, *District Judge:*

The instant motion for a preliminary injunction, brought on by an order to show cause, raises important questions as to the proper interpretation of the 1951 amendments to the Railway Labor Act. Plaintiffs are three yard service employees of the defendant Erie Lackawanna Railroad Company (hereinafter referred to as the Erie), who sue

individually and on behalf of all members of the Switchmen's Union of North America, AFL-CIO, (hereinafter referred to as the Switchmen's Union) employed by the defendant railroad. The Switchmen's Union is also a party plaintiff. The defendants are the Erie, the Brotherhood of Railroad Trainmen (hereinafter referred to as the Brotherhood), and two officers of the Brotherhood who are sued in their individual and representative capacities.

According to the verified complaint, the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad merged in October, 1960, to form the defendant railroad. For many years prior to the merger the Switchmen's Union had been the duly designated and recognized representative of the craft or class of yard foremen, helpers and switch tenders (hereinafter referred to as yard service employees) of the Delaware, Lackawanna & Western R.R. Co., while the Brotherhood similarly represented the yard service employees of the Erie Railroad.

In March, 1964, the National Mediation Board conducted an election among all of the yard service employees of the merged railroad. The Brotherhood received 43 more votes than the Switchmen's Union, and was designated as their representative. Until March, 1967, the collective bargaining agreement between the Brotherhood and the Erie, like the pre-merger agreements of both the Switchmen's Union and the Brotherhood, contained a union shop clause which was expressly qualified by the language of Section 2, Eleventh (c) of the Railway Labor Act. Under this agreement, more than 500 yard service employees of the Erie maintained membership in the Switchmen's Union without joining the Brotherhood.

Opinion by Herlands, D.J.

On March 14, 1967, the Brotherhood and the Erie entered into a new collective bargaining agreement, effective immediately, which provided that, as a condition of continued employment, all yard service employees in the New York Terminal Yards of the Erie "shall become and remain members" of the Brotherhood. No alternative membership clause was included in the union shop provision.

The essence of plaintiffs' claim is that this strict union shop agreement violates the Railway Labor Act in that it fails to provide—in accordance with Section 2, Eleventh (c) (45 U.S.C. § 152 Eleventh (c))—that the requirement of union membership shall be satisfied if an employee maintains membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board.

The complaint further alleges that the Brotherhood and the Erie "have threatened and are threatening" to discharge the individual plaintiffs and all other members of the Switchmen's Union employed by the Erie, unless they end their membership in the Switchmen's Union and become and remain members of the Brotherhood.

Each of the plaintiffs and the members of the class they represent have seniority rights and other employment benefits which would be lost in the event of a discharge for failure to join the Brotherhood as required by the new agreement. On the other hand, valuable insurance rights would be lost if they failed to continue membership in the Switchmen's Union. Yet, the constitution of the Brotherhood bars dual membership in a union, such as the Switch-

men's Union, which is seeking representation rights on behalf of the same class of employees on the same railroad. Even if they are not discharged for maintaining membership in the Switchmen's Union, they could not afford to pay fees and dues to two unions.

On the basis of these factual allegations, plaintiffs contend that their rights—protected under Section 2 of the Railway Labor Act—are being infringed, and that the defendants have caused and are threatening to cause irreparable injury to the plaintiff employees for which no remedy in money damages is available. They pray for a preliminary and permanent injunction restraining the defendants from "discharging or threatening to discharge, or attempting to cause the discharge" of any employee who fails to join the Brotherhood, so long as he maintains membership in the Switchmen's Union. They also seek a judgment declaring the union shop agreement null and void. Finally, plaintiff Switchmen's Union asks for money damages in the sum of 100,000. dollars.

The Brotherhood's verified answer admits that Exhibit A annexed to the complaint is a true copy of the collective bargaining agreement entered into between the Brotherhood and the Erie, but denies its illegality and denies substantially all of the other allegations of the complaint. Of immediate significance on this motion is defendant Brotherhood's denial that this Court has jurisdiction to construe the collective bargaining agreement, because Congress has vested exclusion jurisdiction over such disputes in the National Railroad Adjustment Board, and to system, group or regional Boards of Adjustment. The Brotherhood further denies that this Court has jurisdiction to determine the legality of the agreement under the Railway

Labor Act until the plaintiff employees have exhausted the procedures of the contract. The Brotherhood's verified answer also contains a counterclaim for libel.

The question of jurisdiction may be disposed of summarily. Plaintiffs invoke the power of this Court under 28 U.S.C. § 1337 conferring original jurisdiction upon this court of civil actions arising under any Act of Congress regulating Commerce, and under 28 U.S.C. § 2201, creating the remedy of declaratory judgments.

While the National Railroad Adjustment Board has exclusive and primary jurisdiction over disputes concerning the meaning of collective bargaining agreements in the railroad industry (*Slocum* v. *Delaware, Lackawanna & Western R.R. Co.*), 339 U.S. 239 (1950), and the instant agreement expressly provides its own procedure in cases of non-compliance with its provisions, it is well settled that the federal district courts have jurisdiction to grant injunctive and declaratory relief when the legality of such an agreement under the Railway Labor Act is called in question. See, e.g., *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Locomotive Firemen & Engineers*, 338 U.S. 232, 239 (1949); *Tunstall* v. *Brotherhood of Locomotive Firemen & Engineers*, 323 U.S. 210, 212-213 (1944); *Switchmen's Union of North America* v. *Southern Pacific Co.*, 253 F.2d 81 (9th Cir.), cert. denied, 358 U.S. 818 (1958).

The present action is governed by the principles expounded by the above decisions. There is here no question as to the proper construction of a collective bargaining agreement or its proper application to specific employees; rather, the issue posed is a straightforward question of statutory interpretation.

The Brotherhood frankly conceded upon oral argument —as it was obviously compelled to do—that the union shop clause[1] of the new collective agreement would violate Section 2, Eleventh (c) of the Railway Labor Act if the latter were construed literally. The Brotherhood contends, however, that the legislative history of the provision in question, and the decisions construing it, unmistakably demonstrate the legality of the disputed agreement in the circumstances here prevailing.

Resolution of the issue posed necessarily depends upon an understanding of the purpose underlying Section 2, Eleventh (c) and the specific means chosen by Congress to effectuate that purpose.

Until 1951, union shop agreements were outlawed in the railroad industry. The prohibition had been added to the Railway Labor Act in 1934 at the behest of the unions themselves because such agreements had been used by the

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[1] The union shop clause of the collective bargaining agreement between the Brotherhood and the Erie reads as follows:

"1. It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N.J., Newark, N.J. and Dundee, N.J., Port Jervis, N.Y., Middletown, N.Y., Newburg, N.Y., Syracuse, N.Y., Utica, N.Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen."

railroads to perpetuate company unions. This problem having become dissipated with time, Congress amended the Act in 1951 to permit negotiation of union shop agreements. Section 2, Eleventh (a) (45 U.S.C. § 152 Eleventh (a)).

The provision enacted substantially parallels the law applicable to industry in general under the National Labor Relations Act. (29 U.S.C. §§ 157, 158). Its essential purpose is to permit unions—through agreements with employers—to compel the entire membership of the class of employees represented to bear an equitable portion of the cost of such representation. During the hearings leading to the 1951 amendments, however, the unions called attention to a problem—peculiar to the operating trades in the railroad industry—which would result from introduction of the union shop.

As described by the *Supreme Court in Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1952):

> "Labor in this industry is organized largely on craft rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time or a conductor might have to serve temporarily as

brakeman. Under the ordinary union shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits." (352 U.S. at 490)

The legislative representative of the defendant Brotherhood proposed an amendment to the bill at the House and Senate committee hearings, which was aimed at accommodating the needs of employees subject to the problem of intercraft mobility. The proposed amendment read as follows:

"provided that when two or more such crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them."

(Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, p. 69; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess. On H.R. 7789, pp. 32-33.)

On the other hand, the spokesman for the Railway Labor Executives Association—representing twenty one major railway unions including three of the five major unions in the operating trades[2]—urged that the problem of intercraft mobility be left to collective bargaining.

The bill permitting union shop agreements was reported to the Senate without amendment, but the Committee offered an amendment on the Senate floor which read:

> "*Provided further*, that no such (union shop) agreement *shall require membership in more than one labor organization.*" 1950 Cong. Rec., p. 15735

When the Senate again considered the bill after a temporary adjournment, a substitute amendment—drafted at a conference of the railroad labor organizations—was offered[3] and approved. That amendment forms the present Section 2, Eleventh (c), the provision here in controversy. It reads as follows:

> "(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train,

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[2] The three unions are the Switchmen's Union, the Brotherhood of Firemen and Enginemen and the Order of Railway Conductors. The remaining two major unions are the defendant Brotherhood—which had submitted its own proposed amendment—and the Brotherhood of Locomotive Engineers—which had opposed any and all legislation permitting union shop agreements.

These five unions are the only ones represented by members of the First Division of the National Railroad Adjustment Board.

[3] Senator Hill, in explaining the substitute amendment after he had offered it on the floor of the Senate, stated that: "the only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union." 1950 Cong. Rec. p. 16268.

yard, or hostling service, that is an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

Opinion by Herlands, D.J.

I. PLAINTIFFS' PROBABILITY OF SUCCESS

It is the Brotherhood's contention that the explicit language of Section 2, Eleventh (c) is inapplicable here, because "the 'narrow problem of intercraft mobility' does not exist with respect to the employees covered by this contract." The reason given is that "all involved crafts on the railroad are represented by the Brotherhood of Railroad Trainmen and there can be no problem of compulsory dual membership." (Defendant Brotherhood's Memorandum of Law, p. 9.) Correlatively, the Brotherhood argues that, since the Switchmen's Union does not presently serve as authorized bargaining representative for any of the Erie's employees, the plaintiffs here cannot invoke the protection of Section 2, Eleventh (c).

In effect, the Brotherhood is asking for a construction of the statute which conforms to the explicit language of the proposed amendment which the Brotherhood submitted to House and Senate committees during the 1950 hearings on the legislation. That construction would permit an employee—in lieu of joining the labor organization having the union shop agreement—to maintain membership in a labor organization "which is the duly designated or recognized . . . representative of any one of [the crafts or classes in which the employee has employment rights]." Hearings, *supra*. (Emphasis added.)

The recited legislative history demonstrates, however, that the Brotherhood's proposed amendment was not adopted by either of the legislative committees. Rather, the amendment offered and accepted on the floor of the Senate —which forms the present Section 2, Eleventh (c)—was

drafted collectively by the unions themselves.[4] The detailed language of the provision delineates the explicit means for dealing with the problem of intercraft mobility which was chosen by the unions and adopted by Congress.

In the face of this history, it would be a usurpation of the legislative function for this Court to assert that the language does not mean what it says, or that the problem of intercraft mobility ought to be handled by some other approach. While the plain meaning rule is not well regarded in this Circuit,[5] and has very recently been criticized by the Supreme Court in construing labor legislation,[6] the specificity of this particular provision and its legislative history leave little interpretative flexibility.

Most significantly, moreover, we have no reason to doubt that the explicit means delineated by Section 2, Eleventh (c) is the soundest approach to the problem of intercraft mobility.

The Brotherhood argues that Section 2, Eleventh (c) should not be construed to bar strict union shop provisions when the particular factual circumstances do not involve the problem of intercraft mobility. How—as a practical matter—would such a construction of the statute be implemented?

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[4] Until very recently, both the plaintiff Switchmen's Union and the defendant Brotherhood, among others, have expressly conditioned their union shop agreements by the literal terms of Section 2, Eleventh (c). *Cf. NLRB* v. *Drivers Local Union*, 362 U.S. 274, 290 (1960); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 549 (1940).

[5] See, *e.g.*, *Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464, 469-70 (2d Cir. 1966); *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963); *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

[6] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, —— (April 17, 1967) (Slip opinion pp. 5-6).

On each occasion that a strict union shop agreement is executed, the employees who are members of a minority union would be faced with the dilemma with which the instant plaintiffs are confronted. As here, the question of the validity of the agreement inevitably would find its way into the federal courts for an ad hoc adjudication.

But what evidence should be admitted, and what standards should the Court employ in determining the quality and magnitude of the problem of intercraft mobility in a particular situation? Is the Court to make a subjective evaluation of the relatedness of various crafts, the mobility of individual employees, the likelihood of a change in the bargaining representative resulting from shifts in the level of employment, etc.?

While the Brotherhood asserts that a possible standard could be whether the minority union is the designated or recognized representative of any related class or craft, the legislative history indicates that this approach was explicitly suggested to the Congressional committees by the Brotherhood but not adopted by them. It may well be that the railroad unions who drafted this provision collectively, and Congress in adopting their proposal, had chosen the specific approach delineated in Section 2, Eleventh (c)—recognizing that bargaining representatives may change with shifts in the level of employment as employees shuttle between crafts—so as not to upset the balance of union power which existed under the prevalent practice of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union.

In any event, whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees

in the operating crafts without promoting internal warfare between unions. Moreover, the provision—literally construed—reconciles the problem of intercraft mobility with the primary policy underlying the 1951 amendments to allow for an equitable sharing of the cost of representation. For, by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board,[7] membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements.[8]

Absent specific direction by Congress, it would be most imprudent for the federal courts to reach out to create another approach to the problem of intercraft mobility, and thereby assume the role of referee in interunion power struggles. *Cf., Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480, 496 (1957).

Rychlik and Rohrer

The Brotherhood purports to find conclusive support for its position here in two decisions construing the controversial provision of law. While broad language in both opinions lends some support to the Brotherhood's argument, neither case squarely raised the issue presently before this Court.

In *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1957), an operating employee of the railroad had been discharged

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[7] See n. 2, *supra*.

[8] See Plaintiffs' Memorandum of Law, pp. 18-19; Brief for Petitioner Brotherhood of Railroad Trainmen, p. 30; *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1957).

after resigning from the Brotherhood and contemporaneously joining the United Railroad Operating Crafts, a union which he "believed in good faith to be 'national in scope' and 'organized in accordance with' the Act," although it had never qualified as an elector to the First Division of the National Railroad Adjustment Board. The union shop provision of the Brotherhood's collective bargaining agreement was expressly conditioned by the precise language of Section 2, Eleventh (c).

Tracing much of the legislative history, the Court observed that the purpose of Congress was not "to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative, or to help dissident or rising new unions to recruit new members" (352 U.S. at 488-89); rather, the very narrow purpose was "to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." (352 U.S. at 492.)

Inquiring, then, into the "manner in which Congress achieved this purpose," the Court concluded that Section 2, Eleventh (c) did not permit alternative membership in merely "'any' labor organization which was national in scope and organized in accordance with the Act," but only in "such unions as have already qualified as electors to the First Division of the National Railroad Adjustment Board" under Section 3 of the Act. 352 U.S. at 495-96.

While the Brotherhood quotes various passages from the *Rychlik* opinion in support of its present contentions, it is clear that the explicit holding of the decision is not apposite. Moreover, one may—with equal facility—draw inferences from *Rychlik* which are contrary to the Brotherhood's position here.

The other decision relied upon by the Brotherhood is *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (3d Cir. 1966). There, the Brotherhood sat on the other side of the fence, inasmuch as the plaintiff—an employee of the defendant railroad—had been discharged after changing membership from the United Steelworkers of America to the Brotherhood. The Steelworkers union was the designated representative for all crafts and classes of employees on the defendant railroad, a subsidiary of the Bethlehem Steel Corporation—as it was on all other Bethlehem railroad subsidiaries. Its collective bargaining agreement with the defendant railroad contained a strict union shop clause.

Relying upon language in *Rychlik*, the Court of Appeals held that Section 2, Eleventh (c) was inapplicable to the factual situation presented because the plaintiff was "not faced with the dilemma of intercraft mobility." (359 F.2d at 130.) That factual situation, however, is clearly distinguishable from the one now before this Court. Although certification by the National Mediation Board on the Conemaugh & Black Lick R.R.—as on all railroads—is by craft or class, the Steelworkers union in fact represented "all the employees of the Railroad without regard to craft or class delineations." (359 F.2d at 130.) Indeed, the Steelworkers union has been certified as the representative of all employees since 1947, is not a railroad craft union but an industrial union, and has never qualified as an elector to the First Division—or any other division—of the National Railroad Adjustment Board.

Rohrer, therefore, presents a special situation which properly should be limited to its particular facts. To the extent that the decision is persuasive of the Brotherhood's

contentions in the instant litigation, the Court is of the opinion that it should not be followed.

II. Plaintiffs' Irreparable Injury

Plaintiffs having made the "clear showing of probable success"[9] cited by decisions of this Circuit as a prerequisite for the granting of a preliminary injunction, we turn to an examination of those other desiderata which a district court is compelled to evaluate in exercising its sound discretion.[10] In the particular circumstances of this case, primary emphasis must lie with the need to preserve the status quo pending a final determination on the merits.

Here, the individual plaintiffs—and the members of the class they represent—have been caught in the crossfire of an interunion dispute which has been brought to a head by the recently executed union shop agreement. Unless enforcement of the strict union shop clause is temporarily suspended, these employees shortly[11] will be required to choose a course of conduct which may have a crucial and irreversible effect upon their seniority rights, insurance coverage, and other employment benefits. It is neither fair

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[9] *Ames* v. *Associated Musicians*, 359 F.2d 777, 779 (2d Cir. 1966), quoting from *Societe Comptoir De L'Industrie* v. *Alexander's Dep't Store*, 299 F.2d 33, 35 (2d Cir. 1962). The Court of Appeals has stated recently that the "burden is less where the balance of hardships tips decidedly toward the party requesting the temporary relief." *Dino de Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966). *Accord, Unicon Management Corp.* v. *Koppers Co.*, 366 F.2d 199, 204-05 (2d Cir. 1966).

[10] *Santos* v. *Bonanno*, 369 F.2d 369, 370 (2d Cir. 1966); *Huber Baking Co.* v. *Stroehmann Bros. Co.*, 208 F.2d 464, 467 (2d Cir. 1953).

[11] Indeed, while this motion was *sub judice*, the Brotherhood notified employees who were not members of the Brotherhood that they would be cited for non-compliance with the union shop agreement if they failed to make application for membership in the Brotherhood by April 30, 1967.

nor necessary to require these employees to make such a vital decision while their right to maintain membership in the Switchmen's Union alone is being adjudicated. This is particularly so, where the plaintiffs' ultimate rights and remedies may vary markedly according to the course of conduct chosen in the interim. Even if the plaintiffs are eventually successful, their remedy at law may have been rendered wholly inadequate by the course they might choose to protect themselves now.

In sharp contrast, the Brotherhood can show little in the way of potential injury if the defendants are restrained from enforcing the union shop agreement against members of the Switchmen's Union, until the agreement's legality under the Railway Labor Act has been adjudicated. Since the enactment of the 1951 amendments, the Brotherhood has represented crafts and classes of employees on the defendant railroad under union shop provisions explicitly limited by the express language of Section 2, Eleventh (c). No claim has been made on behalf of the Brotherhood that the situation suddenly has become critical, and the Court perceives no precipative circumstance.

Thus, when the present and potential injury to the plaintiffs is weighed against the present and potential injury to the defendants, the balance of convenience inclines heavily on the side of the plaintiffs.[12]

The defendants, singularly and collectively, and their officers, servants and representatives are hereby restrained —pending a final determination of this action—from discharging, or threatening to discharge, or attempting to cause the discharge of the plaintiffs or any other employee of the defendant railroad for failure to join or maintain

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[12] *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966).

membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America.

This opinion constitutes the findings of fact and conclusions of law required under Rules 52 and 65 of the Federal Rules of Civil Procedure.

So ordered.

Dated: New York, N.Y.
April 27, 1967.

WILLIAM B. HERLANDS
U.S.D.J.

APPENDIX "B"

(R. 1225-1234)

Opinion by Palmieri, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances

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Opinion by Palmieri, D.J.

PALMIERI, *J.*

These are cross-motions for summary judgment in an action seeking damages, injunctive relief and a declaratory judgment. The relevant facts are not in dispute.

The dispute is essentially one between railway unions and raises as its central issue the validity of a union shop agreement entered into on March 14, 1967, between the defendant railroad and the Brotherhood of Railroad Trainmen (Brotherhood). The agreement requires all employees covered by it to join and maintain membership in the Brotherhood of Railroad Trainmen.[1] It does not provide, in accordance with the requirements of Section 2, Eleventh (c) of the Railway Labor Act,[2] that alternate membership

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[1] "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N.J., Newark, N.J. and Dundee, N.J., Port Jervis, N.Y., Middletown, N.Y., Newburg, N.Y., Syracuse, N.Y., Utica, N.Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood...."

[2] The pertinent statutory provisions are in Section 2, Eleventh (a) and (c) and read as follows (45 U.S.C. 152, Eleventh):

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; • • •

• • •

in any other union national in scope and admitting yard service employees to membership satisfies the union shop agreement.

All the unions involved are admittedly national in scope, organized in accordance with the Railway Labor Act and admit to membership crafts or classes of yard service employees within the meaning of Section 2, Eleventh (c) of the Railway Labor Act.

The plaintiffs and intervenor plaintiffs are the Switchmen's Union and the Order of Railway Conductors and their members.

Under date of April 27, 1967, in a well documented opinion, Judge Herlands of this Court granted a preliminary injunction enjoining the defendants from discharging, or threatening to discharge or attempting to cause the dis-

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"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employees, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. *Provided, further*, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

charge of the plaintiffs, or any other employees of the defendant railroad for failure to join or maintain membership in the defendant Brotherhood so long as he maintains membership in the plaintiff Switchmen's Union of North America. In granting threshold injunctive relief it was the Court's decision that the union shop agreement between the Brotherhood and the Erie violated the Railway Labor Act in that it failed to provide, in accordance with Section 2, Eleventh (c) of that act (45 U.S.C. § 152, Eleventh (c)) (*supra,* footnote 2), that the requirement of union membership shall be satisfied if an employee maintains membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board. Judge Herlands traced the legislative history of the statutory provision and concluded that the statutory language and its legislative history left little interpretative flexibility and that "absent specific direction by Congress it would be most imprudent for the federal courts to reach out and create another approach to the problem of intercraft mobility and thereby assume the role of referee in inter-union power struggles. See, *Pennsylvania R. Co.* v. *Rychlik,* 352 U.S. 480, 496 (1957)."

Subsequent to the issuance of the preliminary injunction the intervenor-plaintiff Order of Railway Conductors and Brakemen, and its members, became parties and the preliminary injunction was extended to protect its employees from having to join or maintain membership in the defendant Brotherhood so long as they maintained membership in either the Switchmen's Union or the Order of Railway Conductors.

Opinion by Palmieri, D.J.

The positions of the plaintiffs and the intervenor-plaintiffs with respect to the motions for summary judgment are identical, both asserting the right to protect by appropriate provisions of the railroad's union shop agreement their right to the alternate union membership privilege granted by Section 2, Eleventh (c) of the Railway Labor Act.

This Court accepts and adopts as valid the conclusion that Section 2, Eleventh (c) of the Railway Labor Act was violated by the union shop agreement in question. The contract between the Erie and the Brotherhood fails on its face to recognize the right of the employee to alternate union membership. This is tantamount to a threat to the employee that he will lose his job unless he complies with the language as written. See, *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 779-780 (2d Cir. 1954); *Red Star Express Lines* v. *NLRB*, 196 F.2d 78, 81 (2d Cir. 1952); *NLRB* v. *Local No. 2 Plumbers*, 360 F.2d 428, 435 (2d Cir. 1966). The arguments of the Brotherhood to the contrary are unpersuasive. Prior to the contract in question, and ever since the 1951 enactment of the alternate membership provision, it appears to have been a uniform practice of the Brotherhood and of all operating unions to write the language of Section 2, Eleventh (c), into their contracts as an exception to the requirement of membership.[3] In any event the reserved intentions or asserted policies of the Brotherhood cannot change the impact of its invalid agreement. There is no basis for indulging in any presumption that the defendants intend to recognize the employees' right to alternate union membership as a means of satisfying the union

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[3] David Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. Law Journal, 441, 444 (July 1955):

"Terms corresponding to this clause are found, of course, in every lawful union shop agreement covering the operating crafts."

shop obligation. Nor would it be proper to permit the employees to be caught in a maze of legal subtleties by the equivocal stance the Brotherhood takes in this litigation. Indeed its insistence before this Court that employees have no right to alternate union membership as a means of satisfying the union shop obligation but must join the Brotherhood negates any intention to recognize the validity of Section 2, Eleventh (c), of the Railway Labor Act. The deliberate omission of any reference to this crucial statutory provision in the railroad's union shop agreement with the Brotherhood gave the employees no choice except to seek enforcement of their rights by legal means.

The plaintiffs concede that the resolution of their original claim for damages has become moot in view of the issuance of the temporary injunction. The defendants' counterclaim for damages could become an issue only if the contract complained of were held to be valid as a matter of law. Since the issue of the invalidity of the contract clause complained of must be decided in favor of the plaintiffs, the counterclaim for damages must of necessity be dismissed.

The motion of plaintiffs and intervenor-plaintiffs for summary judgment is granted. The motion of defendants for summary judgment is denied.

Submit order on notice consonant herewith.

Dated: New York, N. Y.
July 25, 1967

EDMUND L. PALMIERI
U.S.D.J.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 244—September Term, 1967.

(Argued January 3, 1968 Decided March 5, 1968.)

Docket No. 31809

JOHN P. O'CONNELL, R. A. GALLO and CHARLES DOYLE, etc., *et al.*,

Plaintiffs-Appellees,

WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON and JOHN A. BISH, etc., *et al.*,

Intervenors-Plaintiffs-Appellees,

—v.—

ERIE LACKAWANNA RAILROAD COMPANY, a corporation,

Defendant,

—and—

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, *et al.*,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *J.*,

granting plaintiff's motion for summary judgment in an action for damages, injunctive relief and a declaratory judgment that two union shop agreements between the Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company which did not provide that membership in any union national in scope and organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in an operating service satisfies the union shop agreement violated Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152, Eleventh.

Affirmed.

LEE LEIBIK, 343 South Dearborn Street, Chicago, Illinois (Ruth Weyand, 343 South Dearborn Street, Chicago, Illinois, on the brief), *for plaintiffs-appellees and intervenors-plaintiffs-appellees.*

ARNOLD B. ELKIND, 122 East 42nd Street, New York, New York, *for defendants-appellants.*

LUMBARD, *Chief Judge*:

Defendants appeal from a judgment which found strict union shop clauses in a railroad collective bargaining agreement void and enjoined the appellants from requiring membership in the appellant union as a condition of continued employment. Appellees successfully argued on motion for preliminary injunction before Judge Herlands, 268 F. Supp. 397 (SDNY 1967), and on motion for summary judgment and a permanent injunction before Judge Palmieri, that the union shop clause appellant negotiated with the railroad violates the clear language of Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152,

Eleventh, and that the union and railroad could not lawfully condition employment upon membership in appellant union even though the union is the sole bargaining agent for all of the railroad's employees. Jurisdiction is based upon 28 U. S. C. §1337 and the Declaratory Judgment Act, 28 U. S. C. §2201.

Appellant concedes that if the words of Section 2, Eleventh of the Railway Labor Act are given their natural meaning, the agreement is invalid.[1] However, it asks the

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1 Section 2

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organization duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * PROVIDED, HOWEVER, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. PROVIDED, FURTHER, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

court to avoid "the melancholy irrationalism of interpreting subsection (c) literally." We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant contends. We affirm.

The suit was brought by the Switchmen's Union of North America, AFL-CIO, and three yard service employees of the Erie Lackawanna Railroad Company on behalf of the more than 500 members of the Switchmen's Union employed by the Erie Lackawanna against defendant-appellant Brotherhood of Railway Trainmen and Erie Lackawanna.

Prior to the merger of the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad in 1960, plaintiff Switchmen's Union had been the recognized bargaining representative of the yard foremen, helpers and switchtenders employed by the Lackawanna Railroad. Appellant Brotherhood represented these same crafts and classes on the Erie Railroad.

Following enactment of the Union Shop Amendment to the Railway Labor Act in January 1951, both unions entered union shop contracts with the railroads with which they had collective bargaining agreements. They incorporated into the contracts the language of Section 2, Eleventh of the Railway Labor Act as amended, 45 U. S. C. 152, Eleventh (1964), and construed the union shop provisions so that membership in either Switchmen's Union or Order of Railway Conductors satisfied the membership requirements of the Brotherhood's contract and membership in the Brotherhood satisfied the membership and requirement of the Switchmen's contract.

When the two railroads merged in 1960, the National Mediation Board conducted an election among all the yard

service employees of the merged railroads. The Brotherhood won from the Switchmen's Union by 43 votes out of a total of 1943 votes cast. In a representation election in November 1967 the Brotherhood received 941 votes to the Switchmen's Union's 695. From 1960 until March 1967, appellant Union and defendant railroad construed and applied the union shop provisions of the contract so that membership in either the Switchmen's Union or Order of Railway Conductors satisfied the membership requirement.

On March 14, 1967 the Erie Lackawanna and appellant entered a collective bargaining agreement which provided:

> "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards . . . represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen."

On April 4, 1967 the same parties entered a similar contract with respect to employees on the Erie District requir-

ing them to become and remain members of appellant union as a condition of continued employment.

In granting a preliminary injunction against enforcement of this union shop provision, Judge Herlands found that the union shop agreements entered in 1967 violated the Railway Labor Act because they failed to permit employees to satisfy the membership requirements of the contract through membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board. 268 F. Supp. 397 (S D N Y 1967). After the preliminary injunction was granted, the Order of Railway Conductors and Brakemen and four of its members suing on behalf of the more than 225 members of the Order employed by the Erie Lackawanna were granted leave to intervene. On July 25, 1967, Judge Palmieri granted plaintiffs' motion for summary judgment and subsequently issued a permanent injunction. He denied defendants' cross-motion for summary judgment and entered judgment for plaintiff on appellant's counterclaim.

We believe that the legislative history of the section shows that it was meant to permit membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board to satisfy the union shop requirement of a contract pursuant to section 2, Eleventh of the Railway Labor Act.

The Seventh Circuit recently has reached the same conclusion, *Berkholz* v. *Dirks*, —— F. 2d —— (7th Cir. Feb. 12, 1968).

In 1934 the railway unions agreed to amendments to the Railway Labor Act which prohibited all union shop agreements in order to reduce the strength of company unions.

S. Rep. No. 2262, 81st Cong., 2d Sess., pp. 2-3 (1950); Hearings on H. R. 7789 before Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., pp. 3-4, 7-8, 16-17 (1950). See *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 489 (1957). By 1950, with the virtual elimination of company unions, the situation had changed so that twenty-one railway labor organizations, acting through the Railway Labor Executives Association, sponsored a bill to permit railway unions to enter union shop agreements similar to those authorized under the National Labor Relations Act, 29 U. S. C. §§157, 158.

The bill which was originally introduced, S. 3295, 81st Cong., 2d Sess., H. R. 7789, 81st Cong., 2d Sess. (1950), contained only one limitation: that the contracting labor organization must not deny any employee membership or expel him because of membership in any other labor organization. George M. Harrison, spokesman for the Association, testified that the reason for the provision was to permit an employee to retain membership in the union representing the craft or class in which he was mainly employed after temporary promotion or demotion to a different craft or class. He said:

> "Unlike most collective-bargaining representatives in outside industry, there are those in the railroad industry which recognize and protect the rights of employees who, because of the nature of their work, move back and forth across craft or class lines, and consequently move from the rules and working conditions of one collective-bargaining agreement to another. Good examples are those employees in the firemen's craft or class and those in the engineers' craft or class. The ordinary line of promotion for a fireman is to the position of engineer, and in a reduction of forces the

engineer returns to a fireman's position. These two crafts or classes usually are represented by different organizations. Conceivably, either the firemen's or engineers' organizations, or any other organization concerned with the movement of employees back and forth from one craft or class to another, could deny membership to employees who are members of another labor organization, and under a union-shop agreement endeavor to compel a carrier to discharge an employee whom the union would not accept because of his membership in another union.

"[I]t was deemed advisable to make this restriction absolutely clear so that employment could not be denied because a union refused to accept an employee into membership because he belonged to another union. That is the purpose of the phrase on lines 14 and 15 of page 2."

Hearings on S. 3295 Before a Subcomm. of the Comm. on Labor and Public Welfare, 81st Cong., 2d Sess., 18-19. See also Hearings on H. R. 7789 before the Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 13.

However, this wording still created a problem for the railroad operating unions and they opposed the bill because it would have permitted a union to demand that employees working in the craft or class which the union represented belong to the union which was their bargaining representative as well as to the union to which they already belonged. As Mr. Justice Harlan said in *Penn. RR* v. *Rychlik*, 352 U. S. 480, 490 (1957):

"[T]he hearings on the bill revealed a problem, peculiar to the railroad industry, in establishing the union shop. Labor in this industry is organized largely on craft

rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen, and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time, or a conductor might have to serve temporarily as brakeman. Under the ordinary union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of the crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits."

Defendant Trainmen's Union proposed an amendment to the bill to provide for inter-craft mobility without dual-unionism:

"provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is

> the duly designated or recognized craft or class representative of any one of them."

Hearings on S. 3295 at 68-69; Hearings on H. R. 7789 at 32-33. Rejection of appellant's proposal and later adoption of the different language contained in Section 2 Eleventh (c) is a strong indication that Congress did not intend the result which appellant urges upon us.

While the bill was reported to both the Senate and the House without any provision for inter-craft mobility, S. Rep. No. 2262, 81st Cong., 2d Sess. (1951), H. R. Rep. No. 2811, 81st Cong., 2d Sess. (1951), members of the committees which had considered the bills met with representatives of the Railway Labor Executives' Association and the American Federation of Labor and agreed that when the bills were presented on the floor the committees would also offer an amendment stating,

"*Provided further,* that no such agreement shall require membership in more than one labor organization;" 96 Cong. Rec. 15735 (Senate 1950); 96 Cong. Rec. 17052 (House 1951).

In presenting this amendment to the Senate, Senator Hill stated,

> "An employee could belong to as many different unions as he wished to belong to. But he cannot be required to belong to one. If he belongs to one, he meets the provisions of the statute, and he cannot be required to pay dues to or to belong to more than one union."

96 Cong. Rec. 15738. Four of the operating unions, including the Brotherhood of Railway Trainmen and the Order of Railway Conductors, opposed the bill as amended. The Switchmen's Union supported the bill as amended. Consideration of the bill was postponed while the unions opposing

the bill were given an opportunity to agree upon an amendment. 96 Cong. Rec. 16189 (1950). Three of the four unions agreed to support the bill if amended to include the language now contained in Section 2, Eleventh (c). 96 Cong. Rec. 16261, 16330 (1950). Only the Brotherhood of Locomotive Engineers opposed adoption of the bill. Their opposition was based upon a belief that the bill would "guarantee that the young man who has served his apprenticeship as a locomotive fireman shall never be required to become a member of the Brotherhood of Locomotive Engineers." 96 Cong. Rec. 17052 (1951).

On December 7, 1950 Senators Taft and Hill offered the amendment drafted by the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brotherhood of Railroad Trainmen and it was adopted by the Senate the same day. 96 Cong. Rec. 16268 (1950). Senator Holland noted that the debate over the amendment had given notice to the Senate that the amendment made membership in any union among the operating brotherhoods sufficient. 96 Cong. Rec. 16322 (1950). The Senate passed S. 3295 as amended on December 11, 96 Cong. Rec. 16378 (1950). On January 1, 1951 the House agreed to consider S. 3295 in place of H. R. 7789, a similar bill. The debate in the House makes it clear that the Representatives understood the bill to make membership in any of the unions sufficient. Representative Scott, a member of the Interstate and Foreign Commerce Committee, said, "[The bill] provides that in transportation groups such as engineers, firemen, and so forth, membership in any organization, national in scope, which accepts such employees as members shall fulfill requirements of union membership." Representative Harris, who served as spokesman for the House Committee, explained the history of the Senate amendment

and stated that it "leaves to the individual employee in the operating service the choice of operating union to which he will belong, and this specifically resolves any doubt concerning a possible requirement of dual membership." 96 Cong. Rec. 17059 (1951). And Congressman O'Hara endorsed the statement of the Brotherhood of Locomotive Engineers that the amendment would mean that an Engineer would never have to join the Engineer's Union. 96 Cong. Rec. 17052 (1951).

Nevertheless appellant argues that the Supreme Court has limited the application of the proviso to situations where both unions are bargaining agents for crafts or classes of employees on the same railroad. We do not consider the language in *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U. S. 480 (1957) which appellant relies upon to be dispositive. The Court held that "Section 2, Eleventh (c) allows alternative union membership only in those unions which have already qualified under Section 3, First, of the Act, as electors of the union representatives on the National Railroad Adjustment Board, and not membership in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Railway Labor Act." 352 U. S. at 485. The issue of the scope of Eleventh (c) as applied to unions qualified under Section 3, First, of the Act was not before the Court. It only decided that membership in a union which was not so qualified did not satisfy the union shop provisions of the Act.

However, appellant points to other language at page 489 of the opinion:

> "[T]he sole aim of the provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members

> employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative,"

and to a statement at pages 492 and 493 that,

> "The only purpose of Section 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism when an employee temporarily changes crafts. The aim of the Section, which was drafted by the established unions themselves, quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility."

While the Court described the section as having only one purpose, prevention of compulsory dual unionism and provision for intercraft mobility, there are two aspects to the operation of the proviso reflecting the two situations in which intercraft mobility might lead to the dual unionism problem.

First, when an employee changes crafts his new craft may be represented by a different union. Under the statute the employee clearly does not have to change unions. The second situation in which the problem arises, which was not discussed in *Rychlik,* is when so many employees change crafts without changing unions that the bargaining agent for the craft no longer has majority membership in the craft. For example, when there are many layoffs so many engineers may be performing firemen's jobs that there are more engineers than firemen in firemen's posi-

tions. The result might be that the Brotherhood of Locomotive Engineers will get the contracts for both firemen and engineers and the Brotherhood of Locomotive Firemen and Enginemen will no longer have a contract with the railroad. In this situation the firemen may still want to be members of the Locomotive Firemen's Brotherhood which is their traditional craft union. The second aspect of the operations of Eleventh (c) is to permit these firemen, now a minority, to satisfy the union shop requirement by membership in their craft union, even though it is no longer their bargaining agent.

The annual reports of the National Mediation Board to Congress from 1934 to 1950 show that during this period there were 544 instances on 64 different railroads in which, through demotions or promotions due to changed employment conditions or through union recruiting, a minority union in a craft achieved a majority and as a result took over the contract traditionally held by another union. It was with this history in mind that the operating unions drafted the amendment to the bill which became §2, Eleventh (c). Obviously the amendment which the unions drafted was intended to make it clear that an employee would be able to satisfy union shop requirements by retaining membership in an operating union whether or not it was the collective bargaining agent for the craft or class in which he was working and whether or not it was the bargaining agent for any craft or class.

In any event, the Supreme Court noted in its opinion in the *Rychlik* case, that in deciding the case it did not reach the questions which had been decided by this Court. 352 U. S. at 485. Our opinion, remanding to the district court for a finding on whether the union which Rychlik joined was "national in scope" within the meaning of the Act, was predicated upon holding that membership in any such union

would satisfy the requirement of §152 Eleventh (c). 229 F. 2d at 171, 174 (2d Cir. 1956). We see no reason to hold otherwise. No argument has been advanced which compels overruling of our decision in *Rychlik*, as limited by the Supreme Court's holding to unions qualified under Section 3, First of the Act.

We are not persuaded by the contrary holding of the Third Circuit in *Rohrer* v. *Conemaugh & Black Lick Railroad Company*, 359 F. 2d 127 (1966), which the Seventh Circuit also has declined to follow, *Berkholz* v. *Dirks*, —— F. 2d —— (7th Cir., Feb. 12, 1968).

Further, the Supreme Court's decision in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326 (1959) implies that an employee can satisfy the union shop requirement by membership in any of the recognized railroad unions for the First Division, since the Court assumed that Felter had validly changed his union membership although it was clear that he left the union which was his collective bargaining agent and it was not clear that his new union represented any of the railroad's employees.

It is true, as appellant contends, that as in the National Labor Relations Act, the purpose of the union shop is to prevent employees from being "free riders," see *International Association of Machinists* v. *Street*, 367 U. S. 739, 760-64 (1951). But we cannot say that the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose. It is quite conceivable that Congress intended to implement its scheme through a system of reciprocal gains and losses among the various operating unions. While the Brotherhood of Railroad Trainmen does not collect dues from some of the employees of the Erie Lackawanna whom it represents, concededly it collects

dues from employees of other railroads who are represented by other operating unions. See 367 U. S. at 764 n. 15.

We are unable to find any justification for appellant's contention that it is entitled to a strict union shop despite the language of the Act because it is the sole collective bargaining agent for all employees on the railroad.

Appellant's cause of action for libel, pleaded in its answer as a counterclaim, was dismissed below because it "could become an issue only if the contract complained of were held to be valid as a matter of law." We disagree. The alleged libels described the union shop agreement as a "Slave Labor Agreement" and described membership in appellant as "Dictatorship with no voice in the affairs of their Union." No matter what the status of the union shop agreement, reference to a competing union as a "dictatorship" could constitute a libel. However, this cause of action does not arise out of the same transaction or occurrence as appellees' claim. As a permissible counterclaim it must be supported by independent jurisdictional grounds. 6 Moore, Federal Practice par. 13.19[1]. See *Lesnik* v. *Public Industrials Corporation,* 144 F. 2d 968, 975-976 (2d Cir. 1944). We find appellant's counterclaim lacking in this respect and affirm its dismissal for lack of jurisdiction over the subject matter.

The judgment is affirmed.

APPENDIX "D"

Railway Labor Act, 45 U.S.C. 152 Eleventh:

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and

assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a

member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 172

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an Unincorporated Association,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an Unincorporated Association,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on February 12, 1968.

OPINIONS BELOW.

The corrected opinion of the United States Court of Appeals for the Seventh Circuit is reported at 391 F. 2d 289 (*infra*, p. A-1). The Findings of Fact and Conclu-

sions of Law of the United States District Court for the Northern District of Illinois are unreported (*infra*, p. A-13).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court and remanding the cause for further proceedings consistent with the opinion was entered on February 12, 1968 (*infra*, p. A-12). An order was entered on May 13, 1968, by Mr. Justice Thurgood Marshall extending the time for filing a petition for writ of certiorari to June 10, 1968. The jurisdiction of this Court rests upon 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether a union shop agreement between a railroad and the statutory representative of its employees in yard service violates the Railway Labor Act unless it permits the employee to satisfy his compulsory membership obligations by joining a rival minority union that cannot negotiate with the carrier because it has not been designated a bargaining representative of any class or craft on the railroad.

STATUTE INVOLVED.

The relevant provisions of the Railway Labor Act ("Act") are Section 2, Eleventh (a) and (c), 64 Stat. 1238, 45 U. S. C., § 152, Eleventh (a) and (c). They are set out in Appendix "C" (*infra*, p. A-20).

STATEMENT.

Petitioner Brotherhood of Railroad Trainmen ("Trainmen") has, since 1926, served as the duly designated exclusive representative of yard service workers employed by petitioner, Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Lines East) ("Carrier") (App. B, §§ 1, 2 and 5).[1] Through its General Grievance Committee chaired by petitioner Elmer L. Dirks, the Trainmen negotiates and administers comprehensive collective bargaining agreements setting forth rates of pay, rules and working conditions for all of the Carrier's yard service employees.[1] These activities are financially supported only by the membership of the Trainmen on that property (App. B, § 2).[2]

Both the Trainmen and respondent Switchmen's Union of North America ("SUNA") are "national in scope, organized in accordance with" the Act and admit to membership yard service employees.[3] Thus each organization

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[1] In the train service brotherhoods such as the Trainmen, the General Grievance Committee "is in charge of the collective bargaining and grievance work on that line. The chairman of a general committee is the most important union functionary on the road, except when, at his request, an officer of the Grand Lodge is sent on the property to assist him." Seidman, *The Brotherhood of Railroad Trainmen* (Wiley, 1962), p. 2.

[2] "The office of the general chairman, along with the other expenses of the general committee, is financed by a general grievance assessment upon all members under the committee's jurisdiction." In 1962 it varied in amount, from $1.50 to $5.00 or $6.00 monthly, based upon the expenses and work of that committee and normally is the most substantial component of the levy upon the membership. Seidman, *ibid.*, pp. 52, 28.

[3] However, the "vast majority" of switchmen belong to the Trainmen. Levinson, "Railway Labor Act—The Record of a Decade", 3 Lab. L. J. 13 at 26-27 (Jan., 1962). As of June 30, 1967, the Trainmen represented yard service employees on 89 of the 105 major railroads shown; SUNA on 12. Thirty-Third Annual Report of the National Mediation Board for Fiscal Year Ended June 30, 1967, pp. 98-100.

designates one of the five labor representatives on the National Railroad Adjustment Board, First Division.[4] However, SUNA does not negotiate collective agreements with the Carrier, has never been certified or, since 1926, recognized as the representative of any of its employees, and has no obligations under the Act to them (App. B, pp. A-14, A-17). Instead, SUNA is competing with the Trainmen for the allegiance of these yardmen and, on November 14, 1966, petitioned the National Mediation Board under Section 2, Ninth of the Act for a representation election in which to wrest bargaining rights for these employees from the Trainmen (App. B, § 8).

On November 16, 1966, the Trainmen served notice on the Carrier for amendment of its union shop contract, written shortly after enactment of the union shop amendments to the Act and so far as material here, a word for word incorporation of the statutory language. Under a disputed interpretation of the 1953 agreement, some yard service employees, including the individual respondents, belonged to SUNA and not their statutory bargaining representative (App. B, § 3).

On February 1, 1967, the Trainmen and the Carrier amended their union shop agreement to provide as follows:

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[4] The other "qualified" operating organizations are Brotherhood of Locomotive Engineers ("BLE"), Brotherhood of Locomotive Firemen & Enginemen ("BLFE") and Order of Railway Conductors & Brakemen ("ORCB"). The practice is for each to designate one of its vice presidents to sit on the Board. "The NRAB procedures cost the . . . labor organizations only the salaries of their representatives on the Board . . . All other costs [including referee fees and expenses] are met by the taxpayers." "The majority of First Division cases and all of the important ones are deadlocked and submitted to the referees." Mangum, "Grievance Procedures for Railroad Operating Employees", 15 Ind. & Lab. Rels. Rev., 474, 499, 487 (1962).

"Section 1.

(a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *

(b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C., M., St. P. & P. Railroad Company (lines East) covering employees of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employees from changing membership from one organization to another labor organization, having a labor contract with the C., M., St. P. & P. Railroad Company (lines East), covering employees of a craft or class in train or yard service; provided, further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood."

The effect of these changes was to require membership in the Trainmen for all yard service employees except those holding employment rights in another craft or class and to limit alternate membership for such persons to qualified labor organizations having a labor agreement with the Carrier covering the other craft or class involved. This did not permit alternative membership in SUNA to satisfy the agreement because that organization does not bargain collectively with the carrier.

SUNA then brought this action for declaratory judgment, injunctive relief and damages, invoking federal

jurisdiction to determine the validity of the amended union shop agreement under the Railway Labor Act. 45 U. S. C., § 151, *et seq.* and 28 U. S. C., §1337. After a trial on the merits, but at the conclusion of the plaintiff's case,[5] the district court granted Dirks' motion to dismiss the complaint.

Relying upon this Court's decisions in *Rychlik*[6] and *Street*[7] and the Third Circuit's decision in *Rohrer,*[8] the district court found that SUNA members "do not contribute a full share of financial support" to their statutory representative, the Trainmen, and therefore the parties could lawfully contract to eliminate such "free riders". It also held that the amended agreement "adequately meets the narrow problem of intercraft mobility" on the property and thus does not defeat the sole purpose of the alternate union provision, namely "to prevent compulsory dual unionism". Finally, citing *Rohrer,* the district court held that intercraft mobility, as well as selection of a NRAB representative, was prerequisite to application of Section 2, Eleventh (c) of the Act.

On appeal, the Court of Appeals for the Seventh Circuit reversed the district court judgment and remanded the cause for further proceedings consistent with its view that

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[5] Although the judgment below was not a final one, the decision holds that the union shop agreement "is violative of Sec. 2, Eleventh (c) properly interpreted" and thus raises an important and clear-cut issue of law that is "fundamental to the further conduct of the case". Therefore, the judgment is now appropriate for review, *Land v. Dollar,* 330 U. S. 731, 734, fn. 2 (1947); *Larson v. Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 685, fn. 3 (1948).

[6] *Pennsylvania Railroad Co. v. Rychlik,* 352 U. S. 480 (1957).

[7] *International Association of Machinists v. Street,* 367 U. S. 740 (1961).

[8] *Rohrer v. Conemaugh & Blacklick R. R. Co.,* 359 F. 2d 127 (3d Cir., 1966).

Section 2, Eleventh (c) must be given a "literal reading", *i. e.* that a union shop contract must permit membership in any one of the five "qualified" operating service unions to satisfy its compulsory membership requirement. Dismissing this Court's exhaustive analysis of the matter in *Rychlik* as "dictum" (App. A, p. A-11), the Court made its own reading of the legislative history of the 1951 union shop amendments. Its holding turned upon the view that Congress, in authorizing union shop in the operating crafts, not only provided for intercraft mobility but actually intended to "recognize" and "protect" the open shop practice of minority membership in dissident unions within the bargaining unit and frequent raiding among qualified unions.[9] The decision purports

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[9] As corollary points, the court thought that, under petitioner's agreement, the second proviso to Section 2, Eleventh (c) was "devoid of meaning", despite this Court's emphasis in *Felter v. Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959), that the intercraft mobility sections of the *Rychlik* opinion controlled "the area where even a worker under a union-shop arrangement can change affiliations". The agreement here leaves brakemen holding conductor rights "open for solicitation by rival organizations", *i. e.*, the Trainmen and ORCB.

Also, the decision expresses fear that if the instant agreement be held lawful, the courts may be burdened with "*ad hoc* adjudications" as to an individual's job rights in another craft. The fear is groundless, since operating employees can readily determine whether an organization holds a labor agreement with their employer. Likewise, asserted difficulties in determining job rights are a spurious concern. "[T]o become either a conductor or an engineer requires experience as a brakeman or as a fireman, as the case may be. For this reason a brakeman does not lose his seniority as a brakeman when he is promoted to and establishes his seniority date as a conductor (when actual use in that service begins). Instead, his seniority as a brakeman continues to accumulate and his seniority as a conductor begins to accumulate. *His name will appear on both rosters as long as he continues to work in either capacity in the same seniority district.* This same dual seniority arrangement exists also for the fireman-engineer employee." "Seniority Practices—Railroad Operating Employer and Other Industries", Studies Relating to Railroad Operating Employees, Appendix Volume III to the Report of the Presidential Railroad Commission (Wash., 1962), p. 232 (emphasis ours).

to distinguish *Rohrer* because the railroad was "wholly owned by a steel company", "not organized according to crafts", and because the union shop agreement was not "negotiated by one of the five national operating craft unions" (App. A, p. 11).

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Interprets the Union Shop Amendments to the Act in a Manner That Conflicts With Applicable Decisions of This Court and Frustrates Congressional Intent.

This case presents a question of basic importance in the administration of the union shop amendments of the Railway Labor Act covering more than 200,000 operating service employees, the five labor organizations "representing practically all the major railroad's operating employees,[10] and their employers: whether a railroad and the statutory representative of one of its operating crafts may by contract eliminate "free riders" belonging to a rival minority union that First Division, has no collective agreements with that carrier to negotiate or administer, and whose members do not therefore face the very narrow problem of intercraft mobility under railroad union shop contracts. If this question was not answered by this Court in *Rychlik*—and petitioners respectfully contend that it was—then it surely should be decided now.

In *Railway Employes' Dept. v. Hanson,* 351 U. S. 225 (1956), this Court decided that Section 2, Eleventh was constitutionally enacted to permit agreements that compel "financial support of the collective bargaining agency by all who receive the benefits of its work", 351 U. S. at

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[10] Thirty-Third Annual Report of the National Mediation Board for the Fiscal Year Ended June 30, 1967, p. 10.

238. Its purposes parallel and respond to the obligations of the earlier *Steele* doctrine:[11] that the statutory bargaining agency must "represent non-union or minority union members without hostile discrimination, fairly, impartially, and in good faith", 323 U. S. at 204. Only the duly designated bargaining agent carries this duty, since its status "operates to exclude any other from representing a craft" and thus to deprive members of a minority union "of the right, which they would otherwise possess, to choose a representative of their own", 323 U. S. at 200. In *Street,* this Court emphasized that, despite the reach of its "broad language",[12] Section 2, Eleventh must be limited by construction to its legislative purpose: "to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes", 367 U. S. at 764.

The decision below conflicts with *Hanson* and *Street* by refusing to construe Section 2, Eleventh as commensurate with the duty of fair representation impressed upon the statutory bargaining representative. For this union shop agreement insures that an alternate qualified union will in fact function on the property as a statutory representative of a craft in which its members hold job rights in order to benefit from the compulsory membership provisions.[13] By holding that a union shop agreement must afford the operating employee an absolute right to choose membership in any one of the five qualified organizations, without regard to its status as a

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[11] *Steele v. Louisville & Nashville R. R. Co.,* 323 U. S. 192 (1944).

[12] Dissenting opinion of Mr. Justice Black, 367 U. S. at 784.

[13] Because of the dues structure of the train service Brotherhoods, this requirement has wholesome financial implications as well. See *infra,* p. 13.

bargaining representative, the decision below frustrates the "primary union and congressional concern . . . with the elimination of the 'free rider' who did not support *his* representative's performance of *its* functions under the Act", 367 U. S. at 764, fn. 15 (emphasis ours).

Recent drastic reductions in operating service employment coupled with substantially increased costs of collective bargaining representation underscore the importance of the question presented here. Enactment of Public Law 88-108, the award of Arbitration Board 282 on the diesel firemen matter and proceedings to reduce the consist of train, road and yard crews on each property before its subsidiary special boards, have caused substantial increases in representation and litigation expense in the operating crafts while sharply reducing the active membership base that finances the cost.[14]

The decision below holds that a "literal reading" of Section 2, Eleventh compels petitioners to tolerate free riders on the property so long as they belong to any qualified union even one that does not collectively bargain for any employees of the carrier. Worse yet, the decision below finds a statutory purpose to foster minority enclaves of rival union members in the operating crafts, although such members subsidize efforts that force the bargaining agent to divert resources from performing its statutory functions to fending off raids. But so long as the raiding is fratricidal, among qualified unions, the decision below calls it "intercraft mobility" and discerns

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[14] Thus, active membership in the Brotherhood of Locomotive Firemen and Enginemen, which of course is equally affected by the decision below, is estimated to have been cut from 38,000 in 1963 to 21,000 in 1966. The "continued contraction of employment opportunities" in operating service "will serve to buttress [the] traditional rivalry" for members that affects all five qualified operating unions. Levinson, Railway Labor Act—The Record of a Decade, 3 Lab. L. J. 13 at 26-27 (Jan. 1952).

a legislative purpose to protect it as well. These views head on with *Rychlik* and *Street*.

The Court of Appeals thinks it "absurd to interpret away the literal language of 2 Eleventh (c)". But this Court has already held in *Rychlik* that this language, "at first glance . . . disarmingly clear", cannot be read "in a vacuum" but must be construed "in the light of the policies this Section was intended to serve", 352 U. S. at 488. The Court of Appeals believes that Congress intended to perpetuate "the operating craft tradition" existing when the Act barred any form of union security of permitting membership in a minority union after it loses bargaining rights for the craft. But in *Street* this Court emphasized that Section 2, Eleventh must be interpreted, not in the light of the unaccepted desires of certain unions or historical practices, but in accordance with "the reasons advanced by the unions and accepted by Congress" as to why the amendments were warranted, 367 U. S. 740 at 768.

The Court of Appeals found that Section 2, Eleventh (c) was drafted so that an operating employee could choose "membership in any standard operating craft union" to satisfy his compulsory membership obligation. But this Court in *Rychlik* stressed on three separate occasions:

> ". . . The purpose of Congress [in the alternate union provision] was not . . . to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative, or to help dissident or rising new unions recruit new members." 352 U. S. at 488.
>
> ". . . the only purpose of § 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts . . . [It

> was not] intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility." 352 U. S. at 492-493.
>
> ". . . once a union has lawfully established itself . . . as the authorized representative of the employees under a union shop contract, Congress has never deemed it to be a 'right' of employees to choose . . . membership in . . . another competing union . . . The purpose of § 2, Eleventh (c) was simply to resolve the problem of intercraft mobility under railroad union shop contracts." 352 U. S. at 494.

Although it adopts a "literal reading" of the statutory text, the decision below ignores the next-to-last proviso of Section 2, Eleventh (c), requiring a new employee to join the bargaining representative rather than "any union (qualified under Section 2, Eleventh)", which *Rychlik* says "completely negates the argument" that the purpose of the statute was to allow an operating employee to *choose* between "even such competing unions which are concededly national in scope". 352 U. S. at 492, fn. 29.

Congressional intent has been thoroughly frustrated because the Court of Appeals dismissed the dispositive *Rychlik* study of the legislative history as mere "dictum" and made one of its own. Relying upon a supposed motive of the brotherhoods who agreed upon it rather than the clearly expressed intent of its sponsors, the decision below finds a legislative policy to preserve the "balance of power" between the majority and rival minority union members in the craft or class. This doctrine is not only contrary to sound labor policy and inconsistent with this Court's *Rychlik* views, it runs directly contrary to a principal premise on which Congress enacted the amendments. Repeatedly and insistently, union spokesman George Har-

rison, whose statements as to the legislation have been deemed authoritative,[15] argued that authorization of union shops on the railroads would discourage raiding, irresponsible rival union appeals and criticism and other such turmoil, by wiping out the pockets of rival union members that served as its base.[16]

Given the jurisdictional rivalries and the absence of a unitary dues structure among the operating unions, the decision below may operate to frustrate every major purpose for which Congress enacted the union shop amendments. Since the operating employee must join one of the five qualified unions, he is financially encouraged to belong to one that does *not* have collective bargaining obligations on the property since, lacking a grievance assessment,[17] it may offer cheaper dues.[18] In turn, these

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[15] *Street*, 367 U. S. at 761.

[16] "Representation disputes should be reduced under union shop conditions." "The grievance procedure will cease to be a battleground for rival unions." "The union shop makes it more difficult for one union to raid another and thus eliminates or reduces weeks and months of turmoil . . . Employees who participate, through membership, in the formulation of their own . . . working conditions will be much less susceptible to irresponsible appeals and unjustified criticism of rival unions. Where all employees are members . . ., it is just as easy to change the policies . . . as it is to change the collective bargaining representative." ". . . the fact that all of the members of a craft or class may be required to join a union as a condition of employment will do much to discourage raiding by other labor organizations. The rivalry between unions will be decreased rather than increased by reason of the fact that the class or craft will be fully organized and all of its members will belong to the organization representing the members of such class or craft." House Hearings, on H. R. 7789, 81st Cong., 2d Sess., pp. 10, 11, 246. The same theme sounds through the Senate Hearings, 81st Cong., 2d Sess. on S. 3295, pp. 16, 17, 40.

[17] In the operating Brotherhoods the employee will pay nominal dues plus an assessment to finance the activities of the general grievance committee. House Hearings, p. 257; *Street*, 367 U. S. at 766.

[18] This consideration, relied upon in *Street* as a reason why UROC did not qualify under Section 2, Eleventh (c), is equally

revenues are available to finance predatory activities aimed at eventually unseating the bargaining representative.[19] Ultimately, the union required to fulfill all of the obligations of a statutory representative may be left with no membership to defray the cost. Surely, a construction of Section 2, Eleventh (c) that permits such mischief warrants review by this Court.

II. The Decision Below Directly Conflicts With the Decision on the Same Question by the Court of Appeals for the Third Circuit.

The decision below and the decision of the Second Circuit in *O'Connell v. Erie Lackawanna R. R. Co.*; 391 F. 2d 156[20] (2d Cir., 1968) conflict directly with the decision of the Third Circuit in *Rohrer v. Conemaugh & Blacklick R. R. Co.*, 359 F. 2d 127 (3d Cir., 1966). In each case the provisions of Section 2, Eleventh (c) required interpretation, since the employees involved worked in engine, train, yard or hostling service and belonged to a union other than the bargaining representative. In each case, that union was without bargaining rights on the property but was one of the "qualified" organizations that select labor members of the First Division of the National Rail-

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applicable here. "Employees would be tempted to desert the organization of the bargaining representative which was assuming its responsibilities under the Act in favor of another union which was not . . . and which could thereby offer cheaper dues. This would defeat the very purpose of the union [shop] amendment which is to compel each employee to contribute his part to the bargaining representative's activities on his behalf including its participation in the administrative machinery of the Act." *Street*, 367 U. S. at 764, fn. 15.

[19] Such an "actual situation" is discussed and deplored in Levinson, Union Shop Under the Railway Labor Act, 6 Lab. L. J. 441; 448.

[20] Now pending before this Court on petition for certiorari filed June 3, 1968, sub nom. *Brotherhood of Railroad Trainmen v. John P. O'Connell.*

road Adjustment Board. In each case, the validity of the union shop agreement was challenged under Section 2, Eleventh (c) because it failed to permit affiliation with any such union to satisfy its membership requirements.

The court below and the Second Circuit have unequivocally held that each employee in operating service has a statutory right to choose between membership in the authorized bargaining representative and in one of the other four "qualified" unions, even though he faced no problem of "intercraft mobility". The Third Circuit, on the other hand, has held that alternate membership rights need not be extended unless the operating service employee is subject to transfer into the bargaining unit of another contracting qualified union.

The differences in these constructions of the same statute are irreconcilable and, as we have urged, of far-reaching importance in the administration of the Act. They cannot be obscured by seizing upon plainly irrelevant facts or distinctions to limit the opposing holding. The court below rejected *Rohrer* stating:

> "Sec. 2, Eleventh (c) does not apply at all to a railroad which is wholly owned by a steel company, which is not organized according to crafts, and all of whose employees are represented by the United Steel Workers Union" (App. A, p. A-11).

On the contrary, not one word in the statute, the case law, or in *Rohrer* suggests that the validity of union shop contracts depends in any way upon who holds the stock interest, if the railroad is a "carrier" as defined in the Act, or the identity of the Union that has bargaining rights.[21] And there can be no rational distinction between

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[21] In fact, *Rohrer* also rejected a challenge to the validity of its union shop contract because the Steelworkers are not "national

an all-crafts unit and a multi-craft unit on a particular property if, as *Rohrer* holds, the determinative fact in each circumstance is that the operating employee does not face the "necessity of changing from one union to another when [he] . . . temporarily changes crafts". Finally, while the decision below suggests that a distinction exists because the *Rohrer* union shop contract was not "negotiated by one of the five national operating craft unions", Section 2, Eleventh (a) permits no such differentiation, and it rather than subsection (c) defines the terms on which the negotiating union may enter into union shop agreements.

The Second Circuit's opinion in *O'Connell* attempted no distinction but squarely conceded that *Rohrer* was a "contrary holding" to its decision and that of the court below, and expressly declined to follow the Third Circuit's construction of the statute. The legislative will that railroad union shop contracts shall be of uniform application is explicit in Section 2, Eleventh.[22] "Contrary holdings" among the circuits, as much as contrary state or federal laws, frustrate "industrial peace along the arteries of commerce", *Hanson,* 351 U. S. at p. 233, since operating employees move from circuit to circuit as from state to state and rail collective bargaining proceeds in system-wide units that frequently traverse circuit boundaries. Review of the decision below, arising in a jurisdiction that encompasses the rail capital of the nation, and in conflict with that of a circuit containing the headquarters of the country's largest railroad, is a practical imperative.

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in scope", etc., holding that statutory limitation applicable only to the *alternate* union and not to the organization that negotiates the contract. 359 F. 2d at 131-132.

[22] "Notwithstanding any other provisions . . . of any other statute or law of the United States or . . . of any state."

CONCLUSION.

For the reasons stated above, this petition should be granted.

Respectfully submitted,

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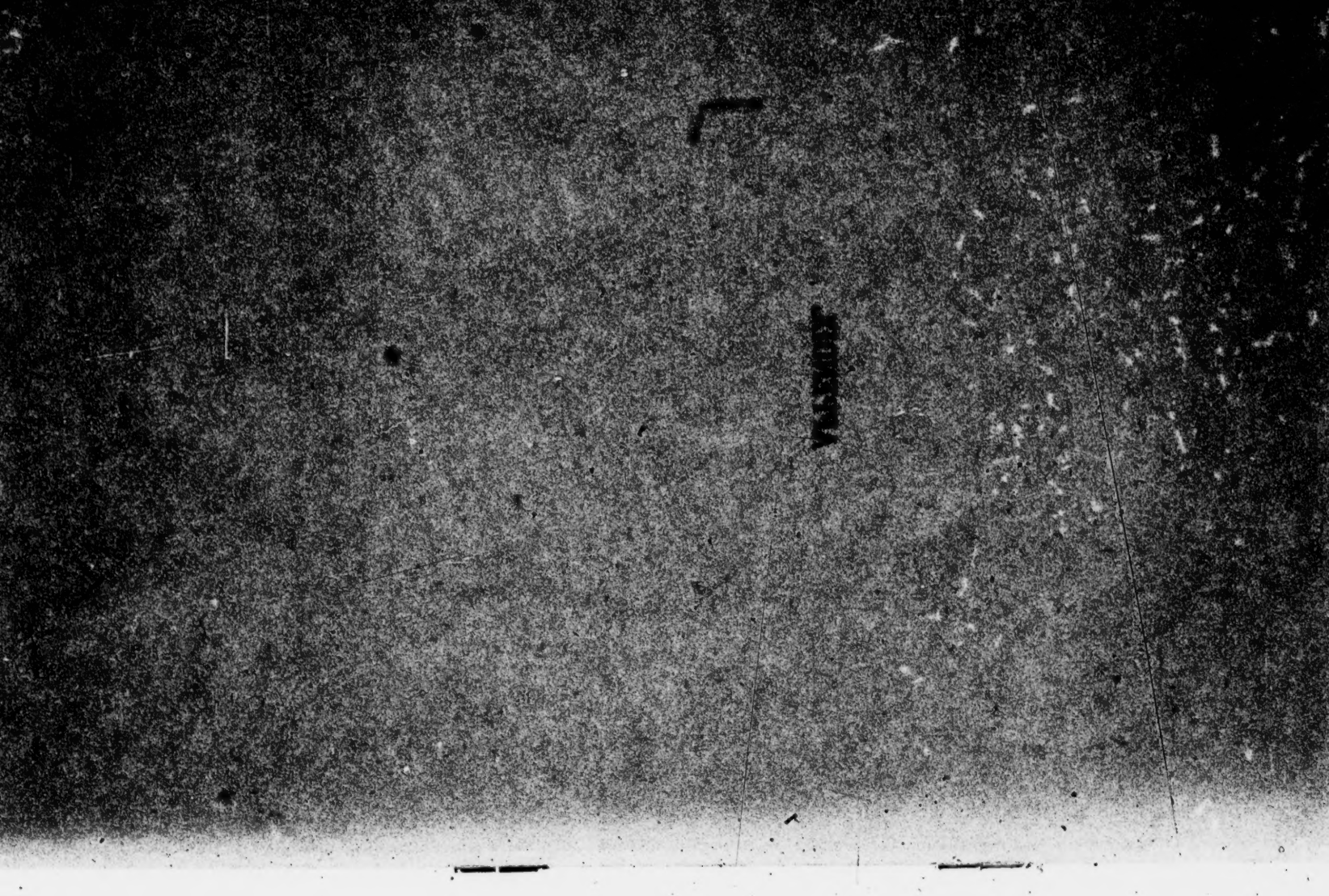
APPENDIX.



APPENDIX "A".

Opinion and Judgment Below.

(Corrected.)

In the
United States Court of Appeals
For the Seventh Circuit

No. 16340 September Term, 1967 September Session, 1967

W. L. Birkholz, *et al.*, Plaintiffs-Appellants, v. Elmer L. Dirks, *etc.*, *et al.*, Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 12, 1968.

Before Schnackenberg, Kiley and Swygert, *Circuit Judges.*

Kiley, *Circuit Judge.* The Switchmen's Union of North America (SUNA) and six of its members sued, individually and as representatives of all members of SUNA who are yard service employees on the Milwaukee, St. Paul, and Pacific Railroad (Milwaukee), seeking a judgment declaring the union shop agreement between the Milwaukee and the Brotherhood of Railroad Trainmen (Trainmen) void, and seeking damages and injunctive relief. The district court after a hearing dismissed the

suit and SUNA and the representative employees appeal. We reverse.

The Trainmen's Union has, since the 1926 adoption of the Railway Labor Act, served as bargaining agent for the Milwaukee's yard service employees. Both SUNA and the Trainmen are among the five national operating craft unions represented on the National Railroad Adjustment Board under Sec. 153 (h) of the Railway Labor Act, 45 U. S. C. Since the Trainmen's Union has been the bargaining agent, some yard service employees have held cards in SUNA rather than in the Trainmen.

On November 14, 1966, SUNA filed a petition before the National Mediation Board for a representative election seeking certification as bargaining agent for all yard service employees of the Milwaukee. Two days later the Trainmen served notice on the Milwaukee for modification of the existing agreement, made in 1953. On February 1, 1967, the agreement was modified by adding the union shop amendment in dispute.[1] SUNA then brought this

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[1] Section 1.

(a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *

(b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East) covering employees of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employees from changing membership from one organization to another labor organization, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East), covering employees of a craft or class in train or yard service; provided, further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood.

suit to void the amendment on the ground that it violated Section 2 Eleventh (c) of the Railway Labor Act.[2]

The district court in dismissing SUNA's complaint decided that the Milwaukee and Trainmen could contract to require members of SUNA to join the Trainmen despite the language of 2 Eleventh (c) because SUNA did not support the bargaining agreement's grievance committee, and had no obligation to the Milwaukee employees; and because the court was persuaded by defendant's argument that 2 Eleventh (c) must be restrictively interpreted to permit the type of union shop clause in the Trainmen's contract because the only purpose of 2 Eleventh (c) was to prevent an employee who temporarily changed crafts from being required to change unions and the contract provision fulfills this purpose. The court relied upon

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[2] (c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of Section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

Pennsylvania R. Co. v. Rychlik, 352 U. S. 480, 492, and *Rohrer v. Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127.

The Trainmen and Milwaukee concede that their union shop clause violates Sec. 2 Eleventh (c) of the Railway Labor Act if that section is read literally. We agree. Par. (c) qualifies the right to enter into a union shop agreement given under Par. (a).[3] Under Par. (c) the membership requirement of the union shop clause must be satisfied as to employees "in engine, train, yard or hostling service" by membership in any union "national in scope, organized in accordance with the Act" which admits to membership any employee in a craft covering any of the services designated. It is plain that under the literal language of Par. (c) any requirement of membership in the Trainmen's Union negotiated under Par. (a) would have to permit alternative membership in SUNA since SUNA admits yard service employees to membership, and is, as the district court found, "national in scope and organized in accordance with the Act."

The union shop agreement signed by the Milwaukee and the Trainmen does not permit yard service employees to maintain alternate membership in SUNA. Under the agreement all operating craft employees must belong to the Trainmen unless they belong to another union which is national in scope and has a contract with the Milwaukee and unless the particular yardman concerned has interchangeable right, *i. e.*, the right to be employed in another

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[3] . . . any carrier . . . and a labor organization . . . shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class:

* * * * * * * *

craft in addition to yard service. Thus the contract requires two conditions, in addition to the national in scope requirement of the Act, before alternate union membership is permissible. Under this agreement a yard service employee's membership in SUNA cannot serve as a substitute for membership in the Trainmen since SUNA has no contact with the Milwaukee and since most yard service employees do not have interchangeable rights.

The vital issue before us is whether Sec. 2 Eleventh (c) renders the February 1, 1967 union shop clause of defendants' agreement void. We think that the literal reading of Sec. 2 Eleventh (c) expresses the intention of Congress as demonstrated by the legislative history of the Act.

The legislative background of Sec. 2 Eleventh (c) is well known. In 1934 Congress, in an effort to combat company dominated unions which were then prevalent on railroads, outlawed the union shop. In 1951, however, railway labor organizations sought the authorization of union shop agreements. Congress was agreeable to authorizing the union shop but in hearings encountered the problem of intercraft mobility. Operating employees organized along craft lines frequently changed crafts either through temporary promotions or demotions as the railroad's needs for workers of a particular craft dictated. An employee who worked in one craft and belonged to his craft union might, for example, upon being promoted to another craft be required by a union shop agreement to belong to the union which represented the new craft to which he had been temporarily promoted. He would then be faced with the choice of either maintaining dual union membership or of quitting his old union and perhaps sacrificing interests in pensions and other benefits under his original craft membership. The problem of intercraft mobility could also affect union members who have no interchangeable rights in another

craft. The union to which these members belong might have interchangeable rights with the first craft and are transferred into that craft. The craft union whose members had interchangeable rights could then negotiate a union shop agreement requiring the employee in the first craft to quit his now minority union or maintain dual union membership.

The evil of placing upon the operating employee the choice of maintaining dual union membership or of quitting his old union was recognized by Congress at the time proposals for authorizing the union shop were being considered. Three proposals for preventing this evil and solving the problem of intercraft relationships among operating employees were considered. The first proposal was aimed at protecting employees from denial of membership in the bargaining union because of membership in another union. This would have protected, for example, a member of the firemen's union from being denied membership in the engineers' union and thereby being denied work in a unit represented by the engineers. All operating unions objected to this proposal because it would not eliminate the choice of maintaining dual union membership or of quitting the union the employee had belonged to in the past.

The second solution was presented by the Trainmen. Under this proposal the union membership requirement authorized by Sec. 2 Eleventh (a) could be satisfied with respect to closely related crafts where the employee held employment rights in more than one, or promotional rights from one, to another, by membership in the craft union which represents the employees in any craft in which he is entitled to work. In other words, the employee member of one of the five crafts could satisfy the membership requirement only by membership in the union that is the bargaining agent for the craft in which he is

working or in a union that is the bargaining agent for another craft in which he is also entitled to work.

This second proposal would have provided the identical amount of protection for minority union members as does the contract entered into by the Trainmen and the Milwaukee and as would Sec. 2 Eleventh (c) if interpreted in the manner urged by the Trainmen. The Trainmen's proposal was rejected by Congress. While it is clear that the Trainmen's proposal would adequately protect the employee who was transferred from one craft to another and did not wish to give up membership in the union which represented his original craft, the proposal would offer no protection to the operating craft employee whose union became a minority union due to an influx of transferees from another craft, nor would the proposal give recognition to the operating craft tradition of permitting membership in minority unions.

The third proposal was a prohibition against requiring membership in more than one labor organization. This would have permitted an employee represented by an operating craft union to maintain membership in a non-operating union despite the existence of a union shop agreement.

The union shop bill as reported to the Senate contained the third proposal outlined above and because of this was opposed by the Trainmen and three other operating brotherhoods. The Senate postponed consideration of the bill to enable the four brotherhoods to produce a compromise proposal which they could all support. The result was the present language of Sec. 2 Eleventh (c) which was approved by the four brotherhoods and which was ultimately incorporated in the Act.

In the light of this legislative history we must reject the restrictive interpretation of Sec. 2 Eleventh (c) which the Trainmen urged unsuccessfully upon the Senate Com-

mittee and now urge upon us. We hold that the union shop provision of the collective bargaining agreement before us is violative of Sec. 2 Eleventh (c) properly interpreted.

We think it would be absurd to interpret away the literal language of 2 Eleventh(c) by reading it as though it said almost exactly what was said in a proposal which was rejected at committee hearings and which places members of SUNA—organized under the Act and national in scope and covering the craft of yard services—in the dilemma of choosing between compulsory dual unionism or a compulsory change from their own craft union to the Trainmen. Each horn of this dilemma was rejected by Congress in 1950. If Congress had intended to limit the protection afforded by 2 Eleventh(c) in the manner urged by the Trainmen they would have used the explicit language which the Trainmen had suggested to them. Moreover it must be remembered that the actual language of 2 Eleventh(c) was drafted by four operating brotherhoods including the Trainmen, and had these brotherhoods agreed that it was desirable to limit the scope of 2 Eleventh(c) as the Trainmen wished, they would have adopted the explicit language previously proposed by the Trainmen.

Moreover, if the interpretation of 2 Eleventh(c) urged by the Trainmen were adopted the result would be to render the second proviso of 2 Eleventh(c) devoid of any meaning. The second proviso states that "nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services." The Trainmen's contract prevents craft employees from switching from the Trainmen to other operating craft unions.

We are impressed with the reasoning of Judge Herlands of the Southern District of New York in his opinion in *O'Connell, et al. v. Erie Lackawanna Railroad Co., et al.*, 65 LRRM 2372. Judge Herlands rejected the argument of the Trainmen there that Sec. 2 Eleventh(c) should not be construed to make a union shop provision requiring members of other operating craft unions to join the Trainmen unlawful, where the men concerned did not have interchangeable rights. Judge Herlands pointed out the difficulties that would follow upon an insistence that Congress, even though it did not express it, intended the validity of a union shop agreement to depend on the interchangeable rights of each employee in the majority and minority unions involved. The result, as Judge Herlands stated, would be that each member of a majority union who is within the jurisdiction of a bargaining contract would be faced with the necessity of proving rights in another craft, and as a result federal courts might be called upon to make ad hoc adjudications in a large number of individual cases. Judge Herlands pointed out several practical problems which would be encountered in making these determinations. One reason that Sec. 2 Eleventh(c) was drafted as it was may well have been to avoid such problems.

We also consider the contemporaneous interpretation of this Section by the operating craft brotherhoods significant in determining its proper interpretations, since they themselves drafted the Section to meet their own needs. It is undisputed that for fifteen years after the passage of the Act all union shop agreements entered into by standard operating unions, including the Trainmen, contained the exact literal language of Sec. 2 Eleventh(c) and that that language was interpreted to permit alternate membership in any standard operating craft union. The Trainmen's position would suggest that the drafters of 2 Eleventh(c), including itself, did not know what the Section meant and

have been misapplying it for fifteen years. This position is inherently unpersuasive especially when it is recognized that the interpretation now urged would change the law to conform to the proposal which the Trainmen unsuccessfully advocated before Congress at the time the Section was enacted.

The fifteen year practice of allowing membership in any standard operating craft union to satisfy union shop agreements also militates strongly against the Trainmen's argument that the elimination of minority representation would promote peace between unions. It is difficult to see how labor peace would be promoted by abrogating what is, in effect, an agreement between the operating brotherhoods which has guided their relations for fifteen years.

We believe that the railroad unions responsible for Sec. 2 Eleventh(c), and Congress, deliberately chose to avoid the dangers of dual unionism by the method outlined in the literal language of Sec. 2 Eleventh(c) in order to provide clear and unequivocal protection from compulsory dual union membership, and also to avoid upsetting the balance of union power between the majority union bargaining agent and substantial minority union members within the bargaining unit.

We do not find *Pennsylvania R. Co. v. Rychlik,* 352 U. S. 480, to be inconsistent with our conclusion that membership in SUNA must satisfy any union membership requirement negotiated by the Trainmen with the Milwaukee. The holding in *Rychlik* is that Sec. 2 Eleventh (c) of the Act makes only unions already qualified as electors for the labor members of the National Railroad Adjustment Board under Sec. 3 First, available for alternate membership under a union shop agreement. The plaintiff there had resigned from the Trainmen's Union and joined UROC, a rising competing union. The Trainmen requested the railroad to discharge Rychlik and this

was done. UROC however, was not a union national in scope eligible to elect members to the NRAB. What the Supreme Court said in dictum in that case was with respect to that factual situation.

The Trainmen also rely on *Rohrer v. Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127, but the holding there was that Sec. 2 Eleventh(c) does not apply at all to a railroad which is wholly owned by a steel company, which is not organized according to crafts, and all of whose employees are represented by the United Steel Workers Union. The Trainmen cite no case where a union shop agreement negotiated by one of the five national operating craft unions was permitted to bar an employee from belonging to another national operating craft union as an alternative to belonging to the bargaining union.

We therefore reverse the judgment of the district court and remand for further proceedings consistent with the views expressed in this opinion.

JUDGMENT.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Monday, February 12, 1968.

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge.

W. L. Birkholz, et al.,
Plaintiffs-Appellants,

No. 16340. vs.

Elmer L. Dirks, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby Remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court filed this day.

APPENDIX "B".

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ORDER.

In the United States District Court.

* * (Caption—67-C-285) * *

Findings of Fact.

1. Defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Carrier") and Brotherhood of Railroad Trainmen, AFL-CIO ("Trainmen") are respectively a carrier and the representative of its yard service employees under the Railway Labor Act, 45 U. S. C., § 151 (Complaint, ¶ 11; Plaintiffs' Exhibit No. 5). Defendant Elmer L. Dirks is General Chairman of the General Grievance Committee maintained by the Trainmen for the Carrier's Lines East (Complaint, ¶ 9).

2. The Trainmen, through its General Grievance Committee, is party to collective bargaining agreements with the Carrier setting forth rates of pay, rules, and working conditions for all yardmen employed on Lines East (Tr. 757-6). The activities of the General Grievance Committee receive direct financial support only from the membership of the Trainmen (Tr. 76-77, 83-84).

3. Both plaintiff Switchmen's Union of North America, AFL-CIO ("SUNA") and the Trainmen are among the five "standard" operating organizations qualified to select or designate members of the National Railroad Adjustment Board, First Division, as provided in Section 3 of the Railway Labor Act, 45 U. S. C., § 153 (Complaint, ¶ 8; Tr. 37, 106). On November 14, 1966, under the terms of the union shop agreement then in effect between the Trainmen and the Carrier, a number of yardmen in the bargaining unit represented by the Trainmen, including

the five individual plaintiffs, held membership in SUNA (Tr. 34, 85).

4. On February 1, 1967, the Trainmen and the Carrier modified their union shop agreement to provide, in relevant part, as follows:

> "Section 1 (b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East) covering employees of a class or craft in train or yard service; provided, however, that nothing contained in this agreement shall prevent any employee from changing membership from one organization to another organization, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East), covering employees of a craft or class in train or yard service; provided further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood" (Plaintiffs' Exhibit No. 9).

The effect of the changes was to require membership in the Trainmen for all yardmen except those holding employment rights in another craft or class and to limit alternate membership for such persons to organizations having a labor agreement with the Carrier covering employees in its train or yard service.

5. SUNA has no labor agreement with the Carrier, does not negotiate basic labor agreements with the Carrier, and has never been certified or recognized as the representative of any employees of the Carrier at any time since passage of the Railway Labor Act in 1926 (Tr. 74-75, 79, 80, 124; Complaint, ¶ 14). Membership in SUNA

will not satisfy the obligations imposed upon yardmen by the February 1, 1967, union shop agreement.

6. SUNA and the Trainmen help finance activities of the Railway Labor Executives Association, a private organization of the presidents of the "standard" railroad labor unions to formulate and sponsor national legislative and policy programs of common concern (Tr. 25, 26, 116). Both organizations have represented their respective memberships on various boards and committees and have participated in certain litigation of interest to railroad labor generally and, on occasion, in the negotiation of particular agreements affecting employees on all Class I railroads (Tr. 27, 31, 32, 33, 34, 83-84, 117-118, 124, 128-129).

7. In several instances, SUNA has chosen to process cases under the Trainmens' collective agreements before designated officers of the Carrier and before the National Railroad Adjustment Board for individual members of SUNA whom the Trainmen would otherwise represent (Tr. 76-78, 79, 114-115, 125). However, on the record as a whole, the Court finds that SUNA members employed by the Carrier do not contribute a full share of financial support to the General Grievance Committee of the Trainmen for the performance of its functions under the Railway Labor Act.

8. On November 14, 1966, SUNA applied to the National Mediation Board for a representation election among yardmen employed on the eastern and western lines of the Carrier, but no such election has been ordered or scheduled by the Board (Plaintiffs' Exhibits Nos. 4, 5 and 6; Tr. 58). SUNA is competing with the Trainmen for allegiance of the yardmen and seeks to supplant the Trainmen as their statutory bargaining representative (Plaintiffs' Exhibit No. 7).

9. Although the February 1, 1967 union shop agreement applied only to Lines East of the Carrier and the Lines

West agreement does not prohibit SUNA membership, SUNA's application for an election encompassed both the eastern and western lines (Tr. 99-103). The evidence does not demonstrate that the defendants modified their union shop agreement for the purpose of influencing the outcome of any election that the National Mediation Board may conduct.

Conclusions of Law.

1. This Court has jurisdiction under the Railway Labor Act, 45 U. S. C., § 151, et seq., and 28 U. S. C. 1337, to determine the validity of union shop agreements.

2. This Court has jurisdiction to determine whether the union shop agreement of February 1, 1967 was entered into by defendants for the purpose of influencing the outcome of a representation election to be conducted by the National Mediation Board. Since the charge involves a dispute between certain employees of the Carrier and their bargaining representative, it is within the jurisdiction of this Court, joinder of the Carrier notwithstanding. *Rumbaugh v. Winifrede Railroad Co.*, 331 F. 2d 530, 535-536, 538 (4th Cir. 1964), Sobeloff, C. J., *cert. denied*, 379 U. S. 929 (1964).

3. The provisions of Section 2, Eleventh, of the Railway Labor Act, 45 U. S. C. 152, Eleventh, authorize carriers and the representatives of their employees to enter into union shop agreements requiring employees within the craft or class represented to become and to remain members of the bargaining representative as a condition of employment.

4. The 1951 union shop amendments to the Railway Labor Act, 45 U. S. C., § 2, Eleventh, were enacted in order that defendants could contract for "the elimination of the 'free rider' who did not support his representa-

tive's performance of its functions under the Act." *International Association of Machinists v. Street,* 367 U. S. 740, 763-64 (1961). It is the statutory representative of the craft or class, in this case the Trainmen, that was the object of Congressional concern. SUNA is without obligations under the Railway Labor Act to employees of the Carrier.

5. The language of Section 2, Eleventh (c) which permits alternative union membership for operating employees in an organization national in scope and organized in accordance with the Act, cannot be literally applied but must be limited in its scope by construction in light of the policy it was intended to serve. "The only purpose of Section 2, Eleventh (c) was a very narrow one—to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Pennsylvania Railroad Co. v. Rychlik,* 352 U. S. 480, 492 (1957).

6. The February 1, 1967, union shop agreement adequately meets the narrow problem of intercraft mobility by permitting alternative membership for yardmen holding employment rights in another craft or class, namely those with interchangeable rights, and in unions that have contracts with the Carrier covering the other craft or class involved.

7. It was not the purpose of Congress in Section 2, Eleventh (c), "to help dissident or rising new unions recruit new members" or to permit "employees to choose between membership in (their bargaining representative) and another competing union." *Pennsylvania Railroad Co. v. Rychlik,* 352 U. S. 480, 488-489, 494 (1957). SUNA a rival organization without a labor agreement covering a craft or class to which yardmen employed by the Carrier may be transferred, is not within the intendment of the statute.

8. The fact that SUNA, like the Trainmen, is qualified to select or designate members of the National Railroad Adjustment Board or participates in other activities of concern to railroad labor generally does not bring SUNA or its members within the alternative union protections of Section 2, Eleventh (c) in the absence of a showing that they face the problem of intercraft mobility. *Rohrer v. Conemaugh & Black Lick Railroad Co.*, 359 F. 2d 127 (3rd Cir. 1966).

9. Since the February 1, 1967 union shop agreement is lawful, its execution and enforcement do not constitute unlawful coercion, interference or influence under Section 2 of the Railway Labor Act, 45 U. S. C., § 152.

10. Defendants have not violated any of the provisions of the Railway Labor Act.

11. The issues in this case are found against the plaintiffs and for the defendants and plaintiffs are not entitled to relief or any part thereof they pray for in their Complaint. The plaintiffs have failed to show any irreparable injury or that they have sustained any damages, the defendants not having been shown to have violated, or to have threatened to violate, the Railway Labor Act.

12. The complaint as to the several defendants must be dismissed in its entirety on the merits with costs.

Julius J. Hoffman,
United States District Judge.

Dated: May 24, 1967.

Judgment Order.

In the United States District Court.

* * (Caption 67 C 285) * *

This cause coming on to be heard on the Verified Complaint of Plaintiffs filed on February 23, 1967 and on the Verified Answers of the Defendants; and

It appearing that a Temporary Restraining Order was denied after arguments on February 23, 1967; and

This cause having been heard on the merits on the said Complaint and Answers on April 3, and 4, 1967, and the Court having heard the testimony proffered by the Plaintiffs and having considered the written evidence offered by the Plaintiffs and having considered the Motions to Dismiss the Complaint by each of the Defendants, and having heard the arguments of counsel and being fully advised in the premises; and

The Court having tried this action upon the facts without a jury and having heretofore found the facts specially, and having heretofore stated separately its Conclusions of Law thereon and having directed the entry of an appropriate Judgment;

It Is Hereby Ordered, Adjudged and Decreed that the Complaint herein be and the same is hereby dismissed and that the Plaintiffs do have and recover nothing from the Defendants by reason of this action against said Defendants; that said action be and the same is hereby dismissed on the merits and that said Defendants do have and recover of and from said Plaintiffs their costs in this action.

Julius J. Hoffman,
United States District Judge.

Dated: May 24, 1967.

APPENDIX "C".

Statute Involved.

The Railway Labor Act, Section 2, Eleventh, (a) and (c) [45 U. S. C., Sec. 152, Eleventh, (a) and (c)]:

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling

service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,
Petitioners,

vs.

JOHN P. O'CONNELL, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

Whether Section 2, Eleventh (c) of the Railway Labor Act, 45 U. S. C. 152, Eleventh (c), should be construed literally so that full effect is given to its clear and unambiguous language providing that membership of an operating employee in any labor organization national in scope satisfies the membership requirement of any collective bargaining agreement applicable to operating employees.

STATEMENT OF THE CASE.

For many years prior to the merger of the Delaware, Lackawanna & Western R. R. Co. and the Erie Railroad in October, 1960, the Switchmen's Union had represented the craft or class of yard foremen, helpers and switchtenders employed by the Delaware, Lackawanna & Western R. R. Co. while the Brotherhood of Railroad Trainmen represented these crafts and classes on the Erie R. R. Co.

Following the enactment of the Union Shop Amendment to the Railway Labor Act in 1951, and at all times thereafter until the merger, the Switchmen's Union and the Trainmen each maintained union shop agreements with the respective railroads on which they held bargaining rights, including both the Lackawanna and the Erie, which by their express language, and by their uniform application, permitted membership in either the Switchmen's Union, the Order of Railway Conductors or the Trainmen to satisfy the union shop requirements.

The Trainmen won bargaining rights for all yard service employees on the merged railroads by a close election in which the Trainmen received 43 more votes than the Switchmen out of a total vote of 1943. Thereafter the Trainmen and the Erie Lackawanna Railroad Company maintained union shop agreements which from 1960 until March 14, 1967 contained express language, and were construed and applied, to permit satisfaction of the membership requirement by membership in either the Switchmen's Union or in the Order of Railway Conductors. More than 500 employees within the craft or class continued at all times to be members of the Switchmen's Union and did not join or maintain membership in the Trainmen. Similarly more than 225 continued as members of the Order of Railway Conductors instead of the Trainmen.

On March 14, 1967 the Erie Lackawanna Railroad and the Trainmen entered into a new union shop agreement which omitted the language permitting alternate union membership and imposed instead an absolute requirement of membership in the Trainmen, applicable to the former D L & W District. On April 4, 1967 a similar change was made in the union shop agreement between the railroad and the Trainmen applicable to the Erie District.

This suit for injunction, declaratory judgment and damages was filed by three yard service employees and four conductors of the Erie Lackawanna Railroad Company on behalf of themselves and all other members of the Switchmen's Union and all other members of the Order of Railway Conductors who are employed by the railroad. The complaint named the Erie Lackawanna Railroad Company and the Trainmen as defendants and alleged that the railroad had entered into union shop contracts which violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act, 45 U. S. C. 152.

Judge Herlands entered a preliminary injunction restraining the railroad and the Trainmen from giving effect to the contracts. Judge Herlands wrote a carefully documented opinion which is printed in Appendix A to the petition, pages 1a-13a, in which he reviewed the legislative history of Section 2, Eleventh (c) of the Railway Labor Act and concluded that Congress intended its language to be applied literally. Judge Herlands stated (Pet., pp. 18a-19a):

> "* * * whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accomodates the needs of the operating crafts without promoting internal warfare between unions. Moreover, the provision—literally construed—reconciles the problem of intercraft mobility with the primary policy underlying the 1951 amend-

> ments to allow for an equitable sharing of the cost of representation. For, by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board, membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements." (Footnotes omitted.)

Upon counter motions for summary judgment, Judge Palmieri entered judgment for the plaintiffs declaring that the contracts of March 14 and April 4, 1967 violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act and enjoining the railroad from discharging or threatening to discharge, and the Trainmen from causing or attempting to cause the discharge of, any employee of the Erie Lackawanna Railroad Company for failure to join or maintain membership in the Brotherhood of Railroad Trainmen so long as he maintains membership in the Switchmen's Union or in the Order of Railway Conductors.

Judge Palmieri wrote an opinion, which is printed in Appendix B to the petition, pp. 20a-25a, which in effect adopted Judge Herlands' opinion.

The Court of Appeals affirmed with an opinion, printed in Appendix C to the petition, pp. 26a-44a, in which it analyzed the legislative history and concluded (Pet., p. 29a):

> "We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant contends. We affirm."

ARGUMENT.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

The language of Section 2, Eleventh (e) of the Railway Labor Act is precise and unambiguous. In pertinent part it provides:

> "The requirement of membership in a labor organization * * * shall be satisfied, as to both a present or future employee in * * * yard service * * * if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however,* that as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft in class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

There could hardly be a more explicit statement that the only instance in which a union representing yard service employees can require an employee to join that union, as opposed to one of the other unions national in scope rep-

resenting operating employees, is when that employee is not a member of any such union, on the effective date of the agreement. In that event, and only in that event, may an employee be required to join the contracting union. This is expressly provided by the next to the last proviso clause in Section 2, Eleventh (c).

And even such an employee, as well as any other employee, may thereafter at any time change his membership to any other union national in scope and admitting to membership operating employees, without thereby putting himself out of compliance with the membership requirements of a valid union shop agreement. This is expressly provided in the last proviso to Section 2, Eleventh (c). This Court in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959) relied upon this last proviso as establishing "the area that the Act leaves open for solicitation by rival organizations" and "the area where even a worker under a union-shop arrangement can change affiliations."

The construction which the petitioners seek to place on Section 2, Eleventh (c), not only lacks any support in the language or structure of the statute or its legislative history, but in addition is completely negated by the last proviso. Petitioners would construe Section 2, Eleventh (c) to protect only an employee who changed crafts from having to change his union. Petitioner's analysis leaves no situation in which an employee could change from membership in the union representing the craft in which he was employed. But Congress expressly gave each operating employee the right to leave the union representing the craft in which he was employed and join another without violating any union shop which Congress permitted to be made. This does not involve keeping membership despite a shift in craft but a change of the opposite sort.

The effect of Section 2, Eleventh (c) is to treat all members of organizations participating on the First Division

of the National Railroad Adjustment Board as a pool for purposes of all union shop agreements permissible for operating employees. This Court has construed the phrase "national in scope" in Section 2, Eleventh (c) as defining those labor organizations in which alternate union membership is permissible as those labor organization which participate in selecting members to serve on the First Division of the National Railroad Adjustment Board. *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480, 485 (1957).

In *Rychlik* (352 U. S. at pp. 494-495), this Court observed that these labor organizations participating in the selection of members of the NRAB were "a group already constituted." This group consists of the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors, the Brotherhood of Railroad Trainmen, a petitioner herein, and the Switchmen's Union, a respondent herein.

As the legislative history set forth in the Court of Appeals' opinion below (Pet., pp. 33a-36a) shows, it was this group of unions which opposed the enactment of a union shop statute applicable to them unless the statute limited the type of union shop permissible so that the membership requirement could be satisfied by membership in any one of them. The Brotherhood of Railroad Trainmen did make an effort to get Congress to adopt the modified form of union shop which it now espouses in its petition, in which the right to alternate membership would be limited to a retention of membership in a labor organization representing the craft or class in which the employee worked prior to an intercraft transfer of working assignment. Congress rejected the Trainmen's proposal. Thus, the construction which the Trainmen seek to have placed on Section 2, Eleventh (c), not only conflicts with that section's express language but also would require a judicial adjudication that Congress accepted what Congress in fact rejected.

The legislative history, which in this regard is also fully set forth in the Court of Appeals' opinion (Pet., pp. 35a-36a), shows that three operating unions, including the Brotherhood of Railroad Trainmen, drafted the present language of Section 2, Eleventh (c), agreed to this language and presented it to Congress as the language which these three operating unions desired adopted by Congress. Thereupon, Congress adopted the proposed language as Section 2, Eleventh (c). And as the quotations from the Congressional Record set forth in the Court of Appeals' opinion (Pet., pp. 36a-37a) show, Senators and Congressmen understood that Section 2, Eleventh (c) in the form in which they were adopting it, permitted any operating employee complete freedom not to belong to the contracting union so long as he belonged to any one of the operating unions which participated in the National Railroad Adjustment Board, First Division.

All operating unions, including the petitioner Brotherhood of Railroad Trainmen, and all carriers, for more than 15 years, understood and applied Section 2, Eleventh (c) literally. Not until the Trainmen and the Chicago Milwaukee, St. Paul & Pacific Ry. Co. on February 1, 1967 entered into the union shop agreement held invalid by the United States Court of Appeals for the Seventh Circuit in *Birkholz* v. *Dirks*, 391 F. 2d 289, petition for certiorari pending, No. 172, O. T. 1968, did any operating union or any carrier attempt to limit the right of any operating employee to belong to any of the standard operating unions. The Seventh Circuit in that case relied upon this uniform application of Section 2, Eleventh (c), stating (391 F. 2d at p. 293):

> "We also consider the contemporaneous interpretation of this Section by the operating craft brotherhoods significant in determining its proper interpretation, since they themselves drafted the Section to meet

their own needs. It is undisputed that for fifteen years after the passage of the Act all union shop agreements entered into by standard operating unions, including the Trainmen, contained the exact literal language of Sec. 2 Eleventh (c) and that that language was interpreted to permit alternate membership in any standard operating craft union. The Trainmen's position would suggest that the drafters of 2 Eleventh (c), including itself, did not know what the Section meant and have been misapplying it for fifteen years. This position is inherently unpersuasive especially when it is recognized that the interpretation now urged would change the law to conform to the proposal which the Trainmen unsuccessfully advocated before Congress at the time the Section was enacted."

The form of union shop prescribed by the literal language of Section 2, Eleventh (c) eliminated the problem of the "free rider" without upsetting "the balance of union power which existed under the prevalent practice of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union" (Judge Herlands' opinion, Pet., p. 13a). These five unions share the costs of bargaining for operating employees, the major portion of which takes place on a national basis, in which all or several of these five unions join in negotiating collective bargaining agreements and in their interpretation by the National Railroad Adjustment Board, First Division. Each of the five maintains a member on the National Railroad Adjustment Board. All participate in many major national negotiations, presentations to National Emergency Boards and to arbitrators or in other aspects of collective bargaining. E.g., 17th Annual Report of N. M. B. for Fiscal Year Ended June 30, 1951, pp. 7-8; 26th Annual Report, p. 16; 27th Annual Report, p. 17; 28th Annual Report, p. 14; 29th Annual Report, pp. 14-15; 30th Annual Report, pp. 15-18; Jacob J. Kaufman, Collective Bargaining in the Railroad Industry (Columbia Univ.

1954), pp. 46-50. Requiring membership in one of these unions assures participation by all employees in bearing the costs of bargaining. Treating the members of the five unions as a pool for union shop purposes follows logically from the pooling by these unions of a substantial part of the costs of collective bargaining.

Tolerance for the existence of substantial enclaves of minority union membership is dictated by intercraft flow of employment not generally present in non-railroad industry. The ebb and flow of firemen to and from engineer's jobs, of engineers to and from firemen's jobs, of trainmen to and from conductor's jobs, of conductors to and from trainmen's jobs, of yard service employes to and from road service jobs, and of road service employes to and from yard service jobs, often results in the change of a majority union to a minority union due in whole or major part to changes in level of railroad employment rather than union recruiting. Any attempt to have legislated traditional union shop practices for this situation would have resulted in major changes in union relationships which neither the unions themselves nor Congress wished to disturb.

The decision below is in accord with the only other decision on the same issue, namely the decision of the United States Court of Appeals for the Seventh Circuit in *Birkholz* v. *Dirks*, 391 F. 2d 289, petition for certiorari pending, No. 172, O. T., 1968.

The petition for a writ of certiorari should be denied because the decision below is correct and presents no issue warranting review by this Court in view of the present state of the decisional law.

II.

THERE ARE NO CONFLICTING DECISIONS.

The petition (p. 5) claims a direct conflict with *Rohrer* v. *Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127 (3rd Cir. 1966). That case did not present, and the court did not rule on, the issue here presented. There the contracting union, the United Steel Workers Union, represented an industrial unit, not a craft unit. The Third Circuit, at page 128 of its opinion, recites that "the National Mediation Board had certified the Union as the bargaining representative of all the employees of the Railroad regardless of their class or craft." Conemaugh & Black Lick Railroad Co. is a wholly owned and consolidated subsidiary of the Bethlehem Steel Company. All of its employees were represented by the United Steel Workers Union, Conemaugh & Black Lick was organized and functioned as an industrial operation rather than as a railroad. The provisions of Section 2, Eleventh (c) are by their terms only applicable to situations where employees are organized and the union certified on the basis of crafts or classes limited to operating employees, namely, the "engine, train, yard or hostling service."

Judge Herlands in issuing the preliminary injunction in the instant case held the factual situation in *Rohrer* to be "clearly distinguishable from the one now before this Court" (Pet., p. 16a). Judge Herlands pointed out that the Steelworkers union "has never qualified as an elector to the First Division—or any other division—of the National Railroad Adjustment Board" and the case "therefore, presents a special situation which properly should be limited to its particular facts." (Pet., p. 16a).

No other conflict is claimed and we know of none.

III.

THE DECISION BELOW IS CONSISTENT WITH A COHERENT NATIONAL LABOR POLICY.

The petition (p. 5) asserts as a reason for granting the writ, that "the philosophy expressed by the interpretation is at war with a coherent national labor policy, not only for industry generally, but for the balance of the railroad industry as well." But there is no magic in a strict union shop which requires its application to all employees. The congressional innovation, at the request of all unions involved, of a more expansive union shop than the traditional one deserves the sympathetic treatment which it received in the courts below. Indeed Judge Herlands expressed the view that "the explicit means delineated by Section 2, Eleventh (c) is the soundest approach to the problem of intercraft mobility" (Pet., p. 12a) for "the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees in the operating crafts without promoting internal warfare between unions" (Pet., pp. 13a-14a).

None of the vices which petitioners (Pet., pp. 5-8) ascribe to a literal interpretation are in fact present. As we have already shown, the extent of sharing of costs by all five unions electors to the National Railroad Adjustment Board, First Division, not only with respect to that Board but with respect to their numerous other cooperative projects, shows that the requirement of membership in one of them eliminates the free rider.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

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July 3, 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 158.

BROTHERHOOD OF RAILROAD TRAINMEN,
an unincorporated association, *et al.*,
Petitioners,

vs.

JOHN P. O'CONNELL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

By consent of the petitioners and respondents, the Brotherhood of Locomotive Engineers files this brief as *amicus curiae.**

INTEREST OF AMICUS CURIAE.

This case is a companion to *Dirks v. Birkholz,* No. 172 (October Term, 1968). The major issue in both cases is: Does section 2, Eleventh (c) of the Railway Labor Act confer a right upon a railroad employee in the operating crafts, who is covered by a union shop agreement requiring membership in a union certified as the exclusive bargain-

* The consents were mailed to the Clerk of this Court on November 18, 1968.

ing representative of all the carrier's employees in several interrelated crafts, to satisfy the membership requirement therein by belonging to a union which is not an authorized representative of any of the carrier's employees?

The Brotherhood of Locomotive Engineers ("BLE") has filed a brief *amicus curiae* in *Dirks, supra*, setting forth in detail its interest and argument in support of the petitioner's position. In the interest of brevity, BLE respectfully requests that its brief therein be referred to as a more exhaustive reference.

As bargaining representative for the craft of locomotive engineers on most of the nation's major railroads and the selector of one representative on the First Division, National Railroad Adjustment Board, the issue involved is of vital concern to BLE. In several instances, BLE has negotiated union security agreements which provide, as does the agreement herein, that employees regularly assigned and working in the crafts represented by BLE, who do not exercise employment rights in a craft represented by another union, must as a condition of continued employment belong to BLE.

On the Richmond, Fredericksburg and Potomac Railroad, BLE is the certified representative of all engine service employees, *i.e.*, engineers and firemen collectively. BLE obtained an agreement requiring them to become and remain members of BLE. Subsequently, the Brotherhood of Locomotive Firemen and Enginemen, a union without bargaining rights on that property, filed suit to prevent its enforcement on the basis that the agreement violated the Railway Labor Act insofar as membership in that union would not satisfy the membership obligations contained therein. In a memorandum opinion, the United States District Court for the Eastern District of Virginia declared the agreement invalid. *Carter, et al. v. Richmond, Fredericks-*

burg and Potomac R. Co. et al., Civil Action No. 4398 (Sept. 12, 1968). A final appealable order has not yet been entered. As soon as that is accomplished, BLE intends to appeal on the same issue presented herein.

Further, BLE has an interest in this litigation, for it believes the underlying rationale would appear to restrict the exclusive authority of the bargaining representative selected by the majority of employees in favor of encouraging representation by rival minority unions, thereby stimulating disorder and instability on union matters among employees in the railroad operating crafts.

ARGUMENT.

The sole purpose of the alternative union membership provision of Section 2 Eleventh (c)—to protect employees subject to temporary intercraft transfers from having to belong to more than one of the organizations holding union security agreements for those crafts—does not arise when one union is the bargaining representative for all of the interrelated crafts.

Both the decisions rendered below in this case and in the companion case of *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir. 1968), are necessarily founded on a theory that Congress adopted a scheme of fostering minority union enclaves in the railroad operating crafts to be achieved by permitting any employee in those crafts to belong to any of the five unions having a representative on the First Division of the National Railroad Adjustment Board. Under this philosophy, it is considered appropriate to carve out a different principle applicable to satisfaction of the union shop obligations in these five railroad crafts than governs industries within the purview of the Labor-Management Relations Act and the non-operating crafts in the railroad industry. Not only does this policy conflict with the limited

purpose of Section 2, Eleventh (c) of the Railway Labor Act [45 U.S.C. 152, Eleventh (c)], it also contravenes the general purposes of the Act by serving to usurp the role of the collective bargaining representative.

In justification of this approach, the court below found, without any basis therefor, that Congress intended to implement the aforementioned scheme through the means of reciprocal gains and losses among the various operating unions. See *O'Connell v. Erie Lackawanna R. Co.*, 391 F. 2d 156, 163 (2d Cir. 1968). This contention fails to adequately answer the question as to why the draftsmen would have intended that an engineer should be able to satisfy the requirements of a BLE union shop by belonging to the Switchmen's Union or the reasoning behind any of the other combinations of unions and employees that could be reached. It is apparent that Congress did not want to achieve the results required by this line of reasoning.

In this regard, this Court has clearly held that "the only purpose of Section 2, Eleventh (c) was a very narrow one—to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Pennsylvania Railroad Co. v. Rychlik*, 352 U.S. 480, 492 (1957). This specific point was later emphasized when the Court said that the section was not "intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility." *Id.* at 493. Rather than following the unequivocal language of this Court's opinion therein, the Court of Appeals felt compelled to follow its own decision in *Rychlik v. Pennsylvania Railroad Co.*, 229 F. 2d 171 (2d Cir. 1956). See *O'Connell v. Erie Lackawanna R. Co., supra*, 162 (2d Cir. 1968). How-

ever, it is submitted the definitive statements of this Court are not obiter dictum to be totally disregarded.

The interpretation below of Section 2, Eleventh (c) goes far beyond the limited purpose expressed in its legislative history as authoritatively found by this Court.

In part, the opinion below attempted to buttress the aforementioned theory by asserting that the decision issued subsequent to the *Rychlik* case in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959) implied that an employee can satisfy the union shop requirements by membership in any of the five qualified unions. This finding was accomplished by surmising that "the Court assumed that Felter had validly changed his union membership although it was clear he left the union which was his collective bargaining agent and it was not clear that his new union represented any of the railroad employees." *O'Connell v. Erie Lackawanna R. Co., supra*, 163. The basic error in this reasoning stems from overlooking this Court's emphasis in *Felter, supra*, at 336-337, that the narrow area left open for solicitation by rival organizations is "where no union shop has been established, or within the area where even a worker under a union-shop arrangement can change affiliations" as described in the intercraft mobility sections of the *Rychlik* opinion.

In addition, review of the lower court opinions in *Felter* establishes that the petitioner therein was employed as a conductor for which craft the Order of Railway Conductors and Brakemen rather than the respondent Brotherhood of Railroad Trainmen was the bargaining representative on the Southern Pacific. 256 F. 2d 429 (9th Cir. 1958), affirming 155 F. Supp. 315 (N.D. Cal. 1957). Thus, contrary to the assumptions of the lower court herein, the employee attempting to revoke a checkoff authorization to the Trainmen's organization in that case was a

conductor for which the union he desired to belong, Order of Railway Conductors and Brakemen, was the authorized bargaining representative.[1] It is, therefore clear that Felter's new union did represent a craft of the railroad's employees, the craft in which he was actually working. Definitely, the question herein was not reached in that case. On the above basis, it could even be validly assumed that the ultimate decision sustains petitioners' contention in regard to the issue now presented.

In summary, application of the "disarmingly clear" language of the section under the rationale exercised below exceeds the very narrow problem contemplated by Section 2, Eleventh (c) by going beyond the problem of employees faced with the dilemma of intercraft mobility. Only where the employee is confronted with compulsory dual unionism and jeopardy to his employment rights by shuttling back and forth between crafts represented by different unions holding union shop agreements does the section contemplate any relief from the obligations of membership in the bargaining representative of the craft in which he is temporarily transferred. This situation cannot arise where, as here, one union represents all engine or train service employees on a railroad; nor where the employee does not shuttle back and forth between crafts; nor where, as here, the union to which the employee may wish to belong is not the bargaining representative for any interrelated craft of employees on the involved rail carrier. In short, Section 2, Eleventh (c) should not be applied to a problem that does not exist in the given factual setting.

On the other hand, the decision below tends to fragmentize representation and collective bargaining in the

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[1] See also Twenty-First Annual Report of the National Mediation Board (1956), Table 12A, fol. p. 74.

railroad operating crafts. It simply fosters minority union enclaves, and as a result, is diametrically opposed to the most basic and specific purpose of union shop agreements —to strengthen the role of the collective bargaining representative. In the instant situation, the choice of a majority of all train service employees pertaining to the certified representative for all employees in those crafts is totally disregarded. Its ability to function in that capacity is unnecessarily weakened without any plausible ground for doing so.

CONCLUSION.

For the above reasons, it is submitted that the union shop agreement herein is valid and lawful under the provisions of the Railway Labor Act. The decision below should be accordingly reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS,
Individually and as General Chairman of the
BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association, and
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO.,
a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY,
DAVID TUCIBAT, WAYNE BLACKBURN, and
MARVIN HOISINGTON,
Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and
SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO,
an Unincorporated Association,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

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H. R. Rep. No. 2811, Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong. 2d Sess. (1950) 21

Levinson, "The Railway Labor Act—The Record of a Decade," 3 LAB. L. J. 13, at 26-27 (Jan. 1962) 5

S. Rep. No. 2262, Committee on Labor and Public Welfare on S. 3295, 81st Cong. 2d Sess. (1950) 22

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS,
Individually and as General Chairman of the
BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association, and
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO.,
a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY,
DAVID TUCIBAT, WAYNE BLACKBURN, and
MARVIN HOISINGTON,
Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and
SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO,
an Unincorporated Association,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

INTEREST OF AMICUS CURIAE.

The Brotherhood of Locomotive Engineers ("BLE") * is the collective bargaining representative for the craft of locomotive engineers on the vast majority of the nation's major railroads. In some instances, it is also the bargain-

* This brief *amicus curiae* is filed pursuant to consents given by all parties to the above titled case and mailed to the Clerk of this Court on November 18, 1968.

ing representative for the craft of firemen.[1] As a railway labor organization, national in scope and organized in accordance with the Railway Labor Act, BLE designates one of the five labor representatives on the First Division of the National Railroad Adjustment Board, which designee is one of the Brotherhood's vice-presidents. The other operating organizations qualified to designate a labor representative on the Adjustment Board, First Division, are the petitioner Brotherhood of Railroad Trainmen, the respondent Switchmen's Union of North America, Order of Railway Conductors & Brakemen, and Brotherhood of Locomotive Firemen and Enginemen. The latter organization, as bargaining representative for the craft of locomotive firemen on most rail carriers, is the avowed antagonist of BLE in a rivalry which has intensified and escalated after the award was issued by Arbitration Board No. 282 in 1964.

On most railroads where BLE is bargaining representative for the craft of locomotive engineers, it has negotiated union security agreements embodying the statutory language contained in Section 2, Eleventh (c) of the Railway Labor Act (45 U.S.C. § 152, Eleventh (c)). During the past several years, however, BLE has entered into union security agreements with several railroads, which agreements provide, as does the agreement in issue, that those employees regularly assigned and working in the craft represented by BLE, who do not hold interchangeable rights in a craft represented by another union, must as a condition of continued employment acquire and retain membership in the BLE.

For example, BLE is the certified representative for both the crafts of locomotive engineers and firemen on the

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[1] Thirty-Third Annual Report of the National Mediation Board, pp. 98-100 (Wash., D.C. 1968) (referring to employee representation on a selected group of rail carriers).

Richmond, Fredericksburg & Potomac Railroad Company. On December 20, 1966, BLE negotiated a union security agreement which requires the locomotive engineers and firemen employed by that rail carrier to become and remain members of BLE. The agreement further stipulates that employees who are not regularly assigned and working in the crafts of locomotive engineers and firemen, but hold seniority rights in another craft, need not be members of BLE. These individuals may satisfy the membership requirement by holding or acquiring membership in any of the standard operating unions which may hold the bargaining rights on the Richmond, Fredericksburg & Potomac for the craft in which those employees may be regularly working.[2] The agreement also provides that employees who retain seniority in the crafts represented by BLE and who continue in any service covered by BLE collective agreements for thirty calendar days or more shall be considered regularly assigned employees. The Brotherhood of Locomotive Firemen & Enginemen ("BLF&E") objected to this agreement because it has no contract with the railroad,[3] and its members on that property could not, therefore, satisfy the requirements of the union security agreement.

Subsequently, BLF&E and three officers and members thereof brought suit in the United States District Court for the Eastern District of Virginia against BLE and the railroad seeking a declaratory judgment, injunctive relief

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[2] However, none of the employees in the crafts represented by BLE on this railroad hold employment rights or perform temporary services in any craft for which BLE is not the certified bargaining representative.

[3] As minority union, BLF&E is legally prohibited from negotiating such contracts for its members. See *Virginian Ry. Co. v. System Federation*, 300 U.S. 515 (1937); *Switchmen's Union v. Southern Pacific Co.*, 253 F. 2d 81 (9th Cir. 1958), *cert. denied*, 358 U.S. 818 (1958).

and damages. On September 12, 1968, the District Court published a memorandum opinion declaring BLE's union security agreement invalid insofar as membership in BLF&E would not satisfy the requirements thereof. The ruling was based on the decisions rendered by the United States Court of Appeals in the instant case, *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir. 1968), and by the United States Court of Appeals for the Second Circuit in *O'Connell v. Erie Lackawanna R. Co.*, 391 F. 2d 156 (2d Cir. 1968). On the other hand, the court stated that the holding in *Rohrer v. Conemaugh & Black Lick R. Co.*, 369 F. 2d 127 (3rd Cir. 1966), clearly sustained the position of the BLE.[4] Thus, the questions involved are the same as those presented for decision in the instant case:

1) Whether a union security agreement between a railroad and the statutory representative of its employees in an operating craft violates the Railway Labor Act, unless it permits the employee to satisfy his membership obligations by joining a rival minority union that cannot negotiate with the carrier because it has not been designated a bargaining representative of any craft on the railroad; and

2) Whether an employee, who does not hold interchangeable rights in a craft represented by another union and, in fact, is regularly assigned and working in the craft covered by the union security agreement in question, may satisfy the membership obligations thereof by belonging to any one of the five "qualified" labor organizations.

Further, enactment of Public Law 88-108, August 22, 1963, 77 Stat. 132 (45 U.S.C.A. § 157, 1967 Pocket Supp. at 151-2), and the award of Arbitration Board No. 282,

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[4] The District Court has not yet entered a final appealable order in Civil Action No. 4398 (E. D. Va.).

41 LAB. ARB. 673, has, by sharply reducing BLF&E's active membership base,[5] motivated it to invade the traditional representational jurisdiction of BLE and to increase its efforts to enlist members from the most practicable source available to it, locomotive engineers. In view of simultaneous efforts to reduce the consist of train crews, including brakemen, it would appear that the "continued contraction of employment opportunities" in the operating crafts "will serve to buttress [the] traditional rivalry" for members among the unions representing the operating crafts. Levinson, "The Railway Labor Act—The Record of a Decade," 3 LAB. L. J. 13, at 26-27 (Jan. 1962). Under the theory expressed in the opinion of the court below, membership by a locomotive engineer in any of the four organizations other than BLE, including those representing the crafts most adversely affected by the technological changes occurring in the railroad industry, is permissible under the guise of "intercraft mobility." Thus, in addition to BLF&E, the three organizations representing conductors and road and yard trainmen can, and probably will, solicit membership among the engineers or employees in the other operating crafts.

After having determined that a railroad employee in the operating crafts has the right to satisfy the membership requirements of a union security agreement by belonging to any one of the five operating craft unions, the Seventh Circuit subsequently held in *McElroy v. Terminal Railroad Association,* 392 F. 2d 966 (7th Cir. 1968), petition for cert. filed, 37 U.S.L. WEEK 3013 (U.S. May 10,

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[5] 18,000 firemen were severed from employment during 1963 to 1966. *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.,* 385 F. 2d 581, at 610 (D.C. Cir. 1967). Where there were some 38,000 firemen in 1963, the Interstate Commerce Commission in its M-300 Reports for April 1967, indicated the number has been reduced to about 19,000.

1968), on the basis of its decision herein, that locomotive engineers, who are members of BLF&E, can designate that union to represent them in grievance handling and disciplinary investigations as to matters occurring while they perform service as locomotive engineers. This holding was reached even though BLE's agreement was involved and BLE as the certified representative of the craft would not have an opportunity to be present at the adjustment of the grievances. Taken together, the two decisions effectively fragmentize collective bargaining and representation in the railroad operating crafts.

BLE has a vital interest in this litigation, for the rationale underlying these and similar decisions encourages turmoil and agitation on union matters among the railroad operating employees. This Court's decision in the present case will not only affect union security agreements among the railroad operating crafts but will determine, in a critical respect, the extent the craft representative will remain an effective vehicle to achieve stability in labor relations. It is anticipated that a denial of the petitioners' contentions will serve to create the belief that in these five railroad crafts the majority representative's exclusive authority is limited to negotiation and execution of the basic labor contract.

This brief supports the view of petitioners that Section 2, Eleventh (c) of the Act does not invalidate a union security agreement that (1) does not allow an employee to satisfy the compulsory membership requirements by joining a rival minority union, which is not a bargaining representative of any craft on the railroad, and (2) does not permit an employee, who is not involved in shuttling back and forth between crafts represented by different unions, to satisfy the membership requirements by belonging to a union other than the designated craft representative.

SUMMARY OF ARGUMENT.

The policy behind the union shop amendments to the Railway Labor Act was to permit the railroad and the majority representative of a craft to enter into agreements compelling the employees therein to financially support the activities of the collective bargaining agent in negotiating and administering the bargaining agreements for that craft. Allowing employees in the operating crafts to satisfy the membership requirements of a union shop agreement by belonging to a minority union, which is a rival of the craft representative and which does not have any bargaining functions for that or any other craft of employees on the involved railroad, would defeat that concept.

As this Court has found, Section 2, Eleventh (c) was enacted for the narrow and exclusive purpose of protecting only those employees subject to temporary intercraft transfers from having to join more than one union having union security agreements with the carrier. This subparagraph was not inserted to allow an employee the absolute right to choose the union to which he desired to belong; nor was it included to benefit minority unions competing with the majority representative for bargaining rights to a craft. However, a literal reading of this subsection is based on the erroneous conclusion that Congress intended to foster rival minority unions within a craft. Further, the literal application thereof would permit an employee in any of the operating crafts to hold membership in any of the five unions that have representatives on the National Railroad Adjustment Board in satisfaction of the membership requirements of a union shop agreement. Rather than reaching these results, the provisions of section 2, Eleventh (c) were limited to allow only those employees involved in situations of shuttling back and forth between crafts represented by different unions

to belong to either of the bargaining representatives. There was never any understanding that said employee could satisfy his membership obligations by belonging to a union which is not the bargaining representative of the carrier for one of the interrelated crafts, for that employee could never be confronted with the dilemma of dual union membership arising out of inter-craft mobility. For the same reason, an employee, who is regularly employed in a craft and who, therefore, is unable to exercise or does not hold employment rights in another craft, may be required to join and retain membership in the labor organization representing his craft.

ARGUMENT.

I. The union shop amendments to the Railway Labor Act were designed to permit the bargaining representative to compel all employees who receive the benefits of the collective bargaining agreement to contribute to the support of the union which negotiates and enforces the agreement.

In passing section 2, Eleventh of the Railway Labor Act in 1951 (45 U.S.C. 152, Eleventh, 64 Stat. 1238), Congress lifted the prohibition against union shop agreements which had been inserted in the Act in 1934 (§ 2, Fourth and Fifth, 48 Stat. 1186). Section 2, Eleventh (a) of the Railway Labor Act specifically authorizes union shop agreements, also known as union security agreements, only where made by a "labor organization representing their craft or class." [6] The purpose of this provision is to

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[6] Section 2, Eleventh (a) provides: "Notwithstanding any other provisions of this Act * * *, any carriers or labor organizations * * * shall be permitted (a) to make agreements requiring as a condition of continued employment, that within sixty (60) days * * * all employees shall become members of the labor organization *representing their craft or class* * * *." (Emphasis supplied.)

allow the parties by agreement to compel "financial support of the *collective bargaining agency* by all who receive the benefit of *its* work." *Railway Employees Department v. Hanson*, 351 U.S. 225, at 238 (1956).

The legislative history is clear that the amendments permit the union shop solely to "force employees to share the costs of negotiating and administering collective agreements, and the cost of the adjustment and settlement of disputes" and that the only financial support which may be required is that which "directly relates to the work of the union in the realm of collective bargaining." *International Association of Machinists v. Street*, 367 U.S. 740, at 763-4 (1961).

The amendments were not addressed to the benefit of unions generally or even those railroad unions entitled to elect representatives to the National Railroad Adjustment Board. As this Court stated in *Machinists v. Street, supra* at 754:

> "The primary union and congressional concern was with the elimination of the 'free rider' who did not support *his* representative's performance of *its* functions under the Act." (Emphasis supplied.)

Congress was aware that the bargaining representative's participation in the "comprehensive administrative apparatus" created by the Railway Labor Act was more costly because "more complex than that of any other industry." *Machinists v. Street, supra* at 755. And these obligations are far more extensive than merely participating in the selection of the labor representatives to the National Railroad Adjustment Board.

Again referring to the Richmond, Fredericksburg & Potomac Railroad, the BLE, as statutory representative of both engineer and firemen, must establish and bear the full expense of a General Committee of Adjustment

charged with negotiating and enforcing collective bargaining agreements covering approximately 140 employees. The General Committee must pay its officers, provide for clerical help, and must bear all of the other usual administrative expenses. The officers must travel, at General Committee expense, in the performance of their day-to-day-duties for the benefit of the employees represented. Lawyers are retained to assist the BLE and the General Committee in its wide range of activities growing out of the negotiation and enforcement of agreements.

In its position as exclusive bargaining agent for all employees covered by its contract, the BLE is under a legally enforceable duty to represent all employees in the craft fairly and without discrimination. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

A rival minority union, on the other hand, lacks any statutory obligations to its members or other employees of the carrier. It is not required to represent them, nor has it any labor agreement with the carrier to negotiate or administer. This is the exclusive work of the certified representative.

None of the monies received by the minority union is used to defray expenses incurred by the exclusive representative. On the contrary, its expenses as the "out" union are simply organizational in nature, those it chooses to incur in its effort to undermine the "representative's performance of its functions under the Act." *Machinists v. Street*, 367 U.S. 740, at 754.

Sponsors of the union shop bill also urged its enactment to stabilize labor relations in the industry by making it more difficult for another railroad union to raid an established unit, and to reduce "turmoil" and "agitation"

on union matters among railroad employees.[7] As this Court has discerned, no part of the union shop amendments was intended to assist a "dissident * * * union [to] recruit new members." *Pennsylvania Railroad Co. v. Rychlik,* 352 U.S. 480, at 489 (1957). In this regard, as previously noted, BLF&E is a professed rival of the BLE for bargaining rights in various railroad properties.

Any statutory requirement that, as the price of a union shop contract, BLE must subsidize BLF&E's rival organizational efforts through alternative membership provisions would place BLE in an intolerable, competitive situation. Because the minority union's dues need not reflect the substantial expenses of representation, they are often lower than those of the bargaining representative. Thus, if the position taken by the court below is sustained, the statute would actually encourage employees to join an irresponsible union in order to avoid paying a full share of the costs of collective bargaining which, as this Court has recognized, defeats the very purpose of the union shop amendments to the Railway Labor Act.[8]

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[7] Railroad labor spokesman George Harrison, whose statement to the Committees in support of the amendment has been deemed authoritative (367 U.S. at 761), argued this point repeatedly: "The union shop makes it more difficult for one union to raid another, and thus eliminates or reduces weeks and months of turmoil among employees. * * * When your unions operate on a voluntary basis of attracting members, the union is continually on the job agitating for more. In other words, you have got to be militant all the time for people to understand that you are out fighting for their interest. * * * Many times you are forced to handle insignificant violations of your contract because a bunch of your members tell you that they are going to quit paying dues if you do not, and you process a lot of nuisance claims. You will get rid of all of that if you have a union shop." Hearings on H. R. 7789 Before Committee of Interstate and Foreign Commerce, 81st Cong. 2d Sess. 11, 22-23 (1950).

[8] "Employees would be tempted to desert the organization of the bargaining representative which was assuming its respon-

(Continued on following page)

In short, a construction of the statute permitting minority unions to benefit from the incumbent's union shop agreement fractures every purpose that convinced Congress to enact the 1951 amendment. It frustrates the primary concern of requiring employees to contribute their share of the cost of collective bargaining. In their current position, members of rival minority unions would be no different than employees who are members of no union at all; they receive all benefits but contribute nothing to the bargaining agent.

II. The sole purpose of the alternative union membership provision of section 2, Eleventh (c) is to protect employees subject to temporary intercraft transfers from a duty to join more than one of the organizations having union security agreements with the carrier.

From reading the opinion below, it is apparent that the Court of Appeals relied solely on a literal reading of section 2, Eleventh (c),[9] in support of the position that the statute commands the absurd result of permitting an employee who has, for instance, worked regularly for many

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(Continued from preceding page)

sibilities under the Act in favor of another union which was not * * * and which could thereby offer cheaper dues. This would defeat the very purpose of the union [shop] amendments which is to compel each employee to contribute his part to the bargaining representative's activities in his behalf including its participation in the administrative machinery of the Act." *Machinists v. Street, supra* at 764.

[9] 391 F. 2d at 292, 293, where the court accepts a "literal reading" of the section, thereby removing any need for the two provisos to the primary paragraph. For example, if a newly hired fireman may belong to any of five unions, no purpose is served by the first proviso requiring him to join the representative of the craft of firemen. And no purpose is served by the second proviso allowing the employee to shuttle between unions as he shuttles between crafts if he may satisfy his obligation by membership in any of the five unions.

years in the crafts represented by the BLE to belong to another "qualified" organization which does not represent any employees on that railroad. However, this Court has already held that this "disarmingly clear" language cannot be applied literally but must be limited in its scope by construction "in light of the policy [it] was intended to serve." [10] We contend that the clear and compelling interpretation of section 2, Eleventh (c) by this Court in *Rychlik, supra,* controls the issues here.

In *Rychlik,* an employee was discharged by the railroad under a union shop provision drafted in the language of the statute after he resigned his membership in the bargaining representative and joined UROC, a newly organ-

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[10] "At first glance the language of section 2, Eleventh (c) would appear to be disarmingly clear: union-shop contracts are satisfied if the employee belongs to any union which happens to be national in scope and organized in accordance with the Act. * * * However, as so often happens, when the language of the statute is read, not in a vacuum, but in the light of the policies this section was intended to serve, it becomes clear that the purpose of Congress was not, as respondent contends, to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative or to help dissident or rising new unions recruit new members. Rather the sole aim of the provisions was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even *if the member should be working temporarily in a craft for which another union is the bargaining representative.*" *Pennsylvania RR Co. v. Rychlik,* 352 U.S. 480, at 488 (1957). (Emphasis supplied.) The fact that an employee could never be working temporarily in a craft for which another union is the bargaining representative, but could according to the opinion below satisfy the union shop obligations by belonging to another of the "qualified" organizations having a representative on the First Division of the Adjustment Board, points up the peculiar results which can be reached by a broad literal interpretation of the section. It is submitted that the draftsmen did not intend to permit a conductor to belong to BLE or to have an engineer satisfy his obligation by membership in the Switchmen's Union. But respondents of necessity must be committed to this proposition.

ized industrial-type union seeking to represent all operating employees. UROC held no contracts on the property but argued, as do the respondents herein, that it met all of the express conditions of section 2, Eleventh (c), *i.e.*, it was in fact national in scope and organized in accordance with the Act. In sustaining the discharge, the Court construed the Act to permit alternative union membership only in certain very narrow circumstances and even then only in certain qualified organizations.

After a dispositive analysis of the legislative history of the union shop amendments, the Court concluded that Congress enacted section 2, Eleventh (c) solely to apply in a situation peculiar to the operating service on the railroads, namely, to those employees who temporarily "shuttle back and forth" between crafts represented by different labor organizations. While job mobility posed no serious difficulty when union membership was voluntary, the union shop amendments as originally proposed would have created a severe problem for some operating employees.[11] The solution was to provide that the union's security provisions covering the craft to which a member was temporarily transferred could be satisfied during his temporary stay therein by alternative membership in the union which represented the craft in which he was regularly assigned.

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[11] The Committee Bill simply permitted union shop agreements compelling membership in the union representing the craft or class in which the worker was employed. "Under the original union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—*one representing each of his crafts*—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, but the latter would be complicated and might mean loss of seniority and union benefits." *Pennsylvania Railroad Co. v. Rychlik, supra* at 490. (Emphasis supplied.)

The holding of the Court in *Rychlik* on this point is strong and unequivocal:

> "It thus becomes clear that the only purpose of section 2, Eleventh (c) was a *very narrow one*—to prevent compulsory *dual unionism* or the necessity of changing from one union to another when an employee temporarily changes crafts. The aim of this section, which was drafted by the established unions themselves, quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. *Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility." Pennsylvania Railroad Co. v. Rychlik, supra,* at 492-93. (Emphasis supplied.)

No blanket "union shopping" rights were conferred and there was no intent "to allow employees to choose between unions" (352 U.S. 480 at 492, fn. 29). As the Court subsequently stated (352 U.S. at 494):

> "In other words, once a union has lawfully established itself for a period of time as the authorized bargaining representative of the employees under a union shop contract, Congress [conferred no] 'right' of employees to choose between membership in it and another competing union. If Congress intended to confer such right, it would scarcely have denied the right to nonoperating employees of the railroads or industrial employees under the National Labor Relations Act. The purpose of Section 2, Eleventh (c) was simply to solve the problem of intercraft mobility under railroad union-shop contracts."

Accordingly, this Court held in *Rychlik* that two conditions implicit in section 2, Eleventh (c) are to be met before alternative union membership must be provided

under a union shop agreement: (1) the employee to whom alternative union membership is available must actually be involved in a temporary transfer to a class or craft represented by another labor organization; and (2) the employee must be subject to compulsory dual unionism, *i.e.*, a different union must represent the craft or class to which the employee may be transferred, and it must hold a union shop contract that would otherwise apply to him.[12]

Significantly, it is this interpretation of the statute that, as the Court pointed out in *Machinists v. Street*, 367 U.S. 740, at 764, fn. 15, is most "consistent" with the overall purpose of the union shop amendment; namely, to eliminate "free riders," since in all cases the union that benefits from compulsory membership will in fact be performing the functions of a statutory representative on the property.

To be sure, plaintiffs in *Rychlik* sought to satisfy their union shop obligation by joining a rival organization that had not yet qualified to participate in the designation of labor representative on the National Railroad Adjustment Board. However, it is indeed presumptuous to contend that this Court in *Rychlik* made no ruling relevant to the instant case. Almost one-half of the opinion was devoted to a definitive statement of principles controlling the interpretation of Section 2, Eleventh (c), and it cannot be seriously contended that the Court's statements therein are obiter dictum.

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[12] As the Court stated in *Rychlik, supra* at 490: "So Congress faced the problem of reconciling the union shop with some protection to employees who shifted from one craft to another one represented by a different labor organization under a union shop contract. The solution, of course, was evident: to provide that if a fireman, for example, is temporarily promoted to engineer, he can satisfy the union-shop contract of the engineers although still remaining a member of the union representing the firemen."

In *Rohrer v. Conemaugh & Black Lick Railroad Co.*, 359 F.2d 127 (3rd Cir. 1966), the Court of Appeals for the Third Circuit flatly held that *Rychlik* is just as applicable to a "qualified" railroad union as it was to UROC, and that alternative union membership need not be permitted unless an operating employee is involved in a temporary transfer into the representational jurisdiction of another union holding a union security contract on the property.

The Court in *Rohrer* cogently pointed out that *both the employee claiming protection* under section 2, Eleventh (c), *and the alternate union must meet the test* implicit in the statutory purposes:

> "There is clearly no merit to the contention that this case presents us with a situation for the application of § 152, Eleventh (c). Appellant is not faced with the dilemma of intercraft mobility. The union here represents all the employees of the Railroad without regard to craft or class delineation. Appellant in this case is attempting to accomplish exactly what the *Rychlik* case holds he was not entitled to under the Act—that is, the Act provides employees with a right to change unions *only* to meet the narrow problem of intercraft mobility. 352 U.S. at 492-93." (359 F.2d 127). (Emphasis in original.)

In short, only employees involved in temporary intercraft transfers must be given the right to alternative membership, and the union to which they belong must hold the bargaining rights for one of the crafts involved. Otherwise it is impossible to visualize the manner in which seniority rights are jeopardized by union shop agreements in the operating crafts.

Rohrer cannot be distinguished upon the ground that it involves a multi-craft unit represented by a single union or was an industrial entity organized on other than craft units. Certifications by the National Mediation Board on

the Conemaugh & Black Lick Railroad Company demonstrate that representation elections and certifications of the collective bargaining representatives therein is by craft.[13] Although there may have been no union but the Steelworkers on the Conemaugh & Black Lick, this fact was material only to demonstrate that the dilemma of intercraft mobility could not, for that reason, confront Mr. Rohrer. This is the identical situation in the instant case. The individual members of the respondent Switchmen's Union are not confronted with any dilemma of intercraft mobility. On the petitioner railroad, the parties strictly limited their agreement to preclude alternative membership only in those instances where employees will not be subject to transfer to a craft within the jurisdiction of a different bargaining representative.[14] In each case, the principle is the same, and the *Rychlik* reasoning applies.

Thus, despite the definitive analysis of the legislative history of section 2, Eleventh provided by this Court in *Rychlik* and *Street*, respondents must contend that Congress intended by subparagraph (c) of section 2, Eleventh to foster a practice of substantial minority union enclaves in the various bargaining units. In other words, subpara-

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[13] Certification entered by the National Mediation Board in Case No. R-236, dated April 23, 1937, relative to the election of the Brotherhood of Railroad Trainmen as the duly designated and authorized bargaining representative of employees in the commonly referred category of train and yard service employees and of the BLF&E as the bargaining representative of the engine service employees; and certifications by the Board in Case Nos. R-1904 and R-2851, dated October 1, 1947, and June 23, 1954, respectively, relative to a representational dispute concerning the craft of class of locomotive engineers, employees of the Conemaugh & Black Lick Railroad Company. BRT's qualified status, also relied upon by respondent Switchmen's Union herein, and the Board's certifications to Steelworkers on a craft basis shows that *Rohrer* is not a special situation limited to a peculiar set of facts.

[14] See *Birkholz, supra,* 391 F. 2d at 289-90, n. 1.

graph (c) must be read to confer a right on any employee to satisfy the requirement of membership under a union shop agreement by joining or belonging to any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of any craft or class in engine, train, yard, or hostling service.[15] Under this interpretation of the Act, the employee has an unqualified choice in selecting the union to which he desires to belong. It would have nothing to do with protection of seniority during temporary transfers. An analysis of the legislative history clearly demonstrates the error in this chain of reasoning. See also, *Pennsylvania R. Co. v. Rychlik, supra,* at 492, fn. 29.

The initial bills considered by both the Senate and House Committees contained no alternative union mem-

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[15] The opinion below and that in *O'Connell v. Erie Lackawanna R. Co.* 391 F.2d 156 (2d Cir. 1968), justified this approach on bases which are less than real. In *O'Connell,* the concept was forwarded that Congress intended to permit an employee to satisfy the union shop requirements by membership in any operating union, whether or not it was the bargaining agent for any craft, on the basis of changes in the bargaining representatives under Section 2, Ninth. *Id.* at 162. That theory begs the ultimate question, for the same situation exists in the nonoperating crafts and in bargaining units under the jurisdiction of the National Labor Relations Board. When the Machinists supplant the Auto Workers, the employees supporting the latter know they must join the former, and no one is concerned with their wishes.

In this case, the court below felt that a contrary ruling would mean that each employee would be faced with the necessity of proving rights in another craft and the courts, therefore, would be burdened with *ad hoc* adjudications in a large number of individual cases. *Id.* at 293. However, these rights appear on the face of the seniority rosters of the various crafts, which rosters are posted throughout the seniority districts. Each individual is knowledgeable about his seniority. Further, even under the approach of the Second and Seventh Circuits, an employee involved in a temporary transfer, which is the only time that situation could arise, may still be required to furnish proof of membership. See cf. *Brotherhood of R. R. Trainmen v. Smith,* 251 F.2d 282 (6th Cir. 1958).

bership provisions of any kind and were intended to wipe out minority union enclaves in their entirety.[16] In fact, the original proposal was quite similar to that contained in the National Labor Relations Act in that the employee was required to belong to the authorized bargaining representative. These bills, nevertheless, had the support of the Railway Labor Executives' Association representing virtually all the "standard" railway unions, including the Switchmen's Union, the Order of Railway Conductors, and the Brotherhood of Locomotive Firemen and Enginemen.[17] And, as finally enacted, subparagraph (c) of sec-

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[16] See Hearings on H. R. 7789 Before the Committee on Interstate and Foreign Commerce, 81st Cong. 2d Sess. 1 (1950) wherein railway labor representatives, George Harrison of the Railway Labor Executives' Association and Harry See of the Brotherhood of Railroad Trainmen, testified in that regard. *Id.* at 31, 41. See also subparagraph (a) of the original bill which permitted the bargaining representative to make an agreement requiring that "all employees shall become members of the labor organization representing the craft or class of such employees."

[17] Hearings on H. R. 7789, *supra*, note 16, at 6. The same three organizations, which initially advocated a strict union shop, are now opposed to an interpretation limiting alternative membership to employees involved in temporary transfers and then only in the organizations representing the interrelated crafts on the particular railroad involved. The Brotherhood of Railroad Trainmen and BLE opposed the original bill.

BLE continued to object to the bill and subsequently through its chief executive refused to endorse the amended version though not opposed to its passage. 96 CONG. REC. 16261 (Senate 1950). Purportedly, this view was in deference to a resolution of the 1950 BLE Convention. *Proceedings of the Eleventh Triennial Convention,* Grand International Brotherhood of Locomotive Engineers, pp. 862-3 (Cleveland, Ohio, June 23, 1950). The committee report adopted by the BLE convention recommended opposition to Senate Bill 3295 and H. R. 7789 in their original form. Many diverse and inconsistent reasons were submitted in support of the policy resolution, ranging from objections to compulsion through a finding that BLE would lose more members to BLF&E than it would gain since its members set back firing would have to belong to BLF&E (a strict interpretation) to the conclusion that BLF&E with a floating prospective membership would retain its members while work-

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tion 2, Eleventh did not provide an "alternate membership" provision for the railway employees in the "non-operating" crafts.

It was a proposal by the Brotherhood of Railroad Trainmen that first raised the intercraft transfer issue in relation to employees in the "operating" crafts and first presented a solution to the problem based upon granting the employee a choice of membership in either the craft representative of the craft in which he was performing work or the craft representative of the craft in which he held employment rights.[18] At first, the House Committee concluded that any amendment concerning the narrow problem of intercraft mobility in the operating crafts was unnecessary and stated in its report:

> "During Committee consideration of the bill, questions were raised as to the status of employees who are temporarily promoted or demoted from one closely related craft or class to another. While, under the authority granted by the bill, no single agreement could require membership in more than one union, it was contended that as a practical matter this result might follow from two or more agreements between carriers and labor organizations, and, furthermore, that some employees might, in order to retain certain union benefits, feel obliged to be members of more than one union. The Committee decided that these questions should be resolved by negotiation and collective bargaining." [19]

(Continued from preceding page)

ing as engineers (a shuttling back and forth interpretation contrary to the initial statutory language). BLE's national legislative representative continued to oppose any union shop amendment, apparently on the basis that anything BLF&E supported must naturally be detrimental to BLE. 96 CONG. REC. 16330 (Senate 1950).

[18] Hearings on H. R. 7789 *supra*, note 16, at pp. 32-33.

[19] H. R. Rep. No. 2811, Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong. 2d Sess. (1950).

Later on the floor of the Senate, the Committee offered a proviso to its bill,[20] dealing with the intercraft temporary transfer problem and providing simply that "no such [union shop] agreement shall require membership in more than one labor organization."[21] Senator Hill, floor manager of the bill, explained its purpose as follows:

> "This proviso was attached because some question was raised as to the status, under this bill, of employees who are temporarily promoted or demoted from one closely related craft or class to another. This practice, with minor exceptions, occurs only among the train and engine-service employees. Thus, a fireman may be promoted to a position as engineer for a short time and then due to a reduction in force be returned to his former position as fireman. It is the intention of this proviso to assure that in the case of such promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred." [22]

It is apparent from the legislative history of the bill that Congress did not outwardly reject the Trainmen's proposal but severely restricted and narrowed it.[23] At the

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[20] S. Rep. No. 2262, Committee on Labor and Public Welfare on S. 3295, 81st Cong. 2d Sess. (1950).

[21] 96 Cong. Rec. 15735-15736 (Senate 1950).

[22] 96 Cong. Rec. 15736 (Senate 1950).

[23] By emphasizing the last clause of the proposal which referred to "the duly designated or recognized craft or class representative of any one of them," the court in *O'Connell v. Erie Lackawanna R. Co.*, 391 F.2d 156, at 160 (2d Cir. 1958), found contrary to all other indications that Congress did not intend to restrict membership to the craft representatives. A stronger and more plausible argument can be made that the legislative body

(Continued on following page)

outset, Congress began with a strict union shop provision which limited membership to the union representing the craft or class in which the employee was working. The proviso was not intended to circumscribe this basic principle. In other words, the proviso was not inserted to provide the employee with an unlimited choice of unions for membership or to allow him this choice in every given instance. However, the language of the Trainmen proposal would have provided the employee with an unlimited choice of membership between the bargaining representatives of any craft in which he held employment or promotion rights, regardless of his employment status at any given time. Thus, under its proposal, if an employee of a given carrier in the craft of trainmen or brakemen, represented by that union, was subsequently promoted and regularly assigned to the craft of conductors, represented by the Order of Railway Conductors on that carrier, he could satisfy the membership requirement of the latter's union shop agreement by continuing to maintain his membership in the former organization, even if he had been a conductor for one, two, five or twenty years.[24] Said

(Continued from preceding page)

was rejecting the preceding language which concerned situations beyond the temporary transfer or shuttling situation and left the choice of organizations to the employee. See *Pennsylvania Railroad Co. v. Rychlik, supra* at 492, fn. 29.

Since train service employees begin employment as brakemen, which craft is generally represented by BRT, and are, after several years promoted to conductors, the proposal naturally inured to the benefit of BRT. The fledgling employee would have employment rights only as a brakeman and would be required to be a BRT member. On the other hand, the 30 year veteran conductor, having retained seniority rights as a brakeman, could belong to BRT, if it were the representative of that craft.

[24] Citing certain references to the interpretation of BLE's national legislative representative [96 CONG. REC. 17052 (1951)], the court in *O'Connell v. Erie Lackawanna, supra* at 161, said this is exactly what Section 2, Eleventh (c) was intended to do.

(Continued on following page)

proposal completely vitiated the basic premise of the draftsmen of the bill. That Congress did intend, however, to provide certain employees, under limited circumstances, an opportunity of alternative membership in line with the Trainmen's recommendation is clear. But this opportunity was restrictively conditioned to conform to the original and more traditional approach of requiring membership in the union representing the bargaining unit.[25] Thus, it was the legislative intent to permit alternative membership only when all of the following criteria are met:

(1) For the question of alternative membership to arise, there must be two or more closely related crafts represented by different unions and between which some employees temporarily flow back and forth;

(2) The employee who is entitled to alternative membership in satisfaction of his union security obligation to either craft representative must be involved in a temporary promotion, demotion or assignment to the craft closely related to the one in which he is regularly assigned and works;

(Continued from preceding page)

Actually, it would appear that he was viewing the provision as including a strict union shop except in the shuttling back and forth situation. In 1950, there were more firemen than engineers, and the firemen would be in that status for many years (5 to 10) before promotion. Even after promotion to engineer, the individual employee would be often assigned as a fireman for a long period of years. However, BLE could not tap the first source at all, and, under the circumstances, most junior "engineers" could and would conceivably retain membership in BLF&E. At that time, BLE stood in the worst position; and one of its representatives therefore opposed the ultimately enacted bill. It is submitted that BLE's position in 1950 sustains the interpretation urged herein rather than detracting therefrom.

[25] In fact, the "right" of alternative membership in satisfaction of a union shop agreement is so restrictive in the view of this Court that it is not considered a "choice" by the employee. *Pennsylvania RR. Co. v. Rychlik, supra* at 492, fn. 29.

(3) Under the above related circumstances, the employee can choose to continue his membership in the union representing his regular craft or can shift to the union representing the craft in which he is temporarily working for periods of 60 to 90 days and subsequently can revert back to the union representing his regularly assigned craft when returning thereto;[26]

(4) The employee, granted the choice of alternative membership, must select membership in the union which is the duly designated bargaining representative of the craft in which he is regularly assigned or in which he is temporarily transferred and presently working, *i.e.*, the union in which he holds membership must have a collective bargaining agreement with the carrier for one of the two crafts.[27]

Basically, the sole aim of the proviso was to insure that no employee in a transitory stage of employment should be required to belong to two unions to insure protection of his employment rights as he shuttles back and forth between two crafts represented by different unions with union shop agreements.

Later, the Brotherhoods for the operating crafts, excluding BLE, agreed upon a substitute amendment, offered by the floor manager of the bill, which substitute became Section 2, Eleventh (c). In explaining the substitute amendment, Senator Hill stated that its purpose

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[26] 96 CONG. REC. 16268 (Senate 1950).

[27] Under the factual situation herein, the need for providing alternative membership as set forth in the criteria, described in points 1, 2 and 3 above, does not arise, because the employees are not involved in temporary promotions or transfers. In any event, the fourth mentioned point completely answers the issue of law before this Court, since Switchmen's Union is *not* the bargaining agent for any craft.

was identical to that of the earlier Committee amendment —no employee in any of the operating crafts of a railroad should be required to belong to more than one labor organization as a result of a temporary promotion or transfer—[28] and this Court has held accordingly.[29]

It is obvious from the foregoing that Congress did not intend to preserve minority union enclaves in the bargaining unit. Moreover, as has been shown, this Court has analyzed the legislative history of the union shop amendments at length on two separate occasions and concluded that Congress did not intend to confer "union shopping" rights, nor did it desire to assist dissident unions in recruiting and retaining members. Thus, any contention that Congress in effect conferred a right on the employee to satisfy his union shop commitment by belonging to a union that does not hold any bargaining rights or represent any employees on a railroad, is entirely unsupported by any authority. In fact, this position would be at direct variance with both the *Rychlik* and *Street* decisions.

As previously established, one of the two purposes of Section 2, Eleventh, was to reduce turmoil and strife among the employees of a railroad craft by preventing raiding by minority unions and by strengthening the bargaining representative of that craft. If the position of the opinion below is sanctioned, however, it would have to be on the basis that the intendment of section 2, Eleventh (c), was to foster minority unions in a craft represented by the bargaining agent chosen by a majority of the employees. In simple terms, the purpose of the subparagraph would be to promote two or more unions within a given bargaining unit. This approach should be rejected as leading to

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[28] 96 CONG. REC. 16261, 16328-16330 (Senate 1950).

[29] *Pennsylvania RR Co. v. Rychlik, supra* at 492-4.

proliferation of minority unions within the craft unit, as fomenting labor trouble, as promoting ineffective bargaining, and as potentially decreasing the opportunities for orderly and appropriate adjustment to the technological and functional changes presently occurring in the industry.

CONCLUSION.

For the above reasons, it is submitted that the union shop agreement herein is valid and lawful under the provisions of the Railway Labor Act. Accordingly, the decision below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

Opinions Below

On April 27, 1967, the Petitioners were temporarily enjoined by the United States District Court for the Southern District of New York (Herlands, J.) from enforcing the terms of a union security agreement entered into between the Petitioners and the Erie Lackawanna Railroad (268 F.Supp. 397) (29a).

The United States District Court for the Southern District of New York granted Respondents' motions for summary judgment, denied Petitioners' cross-motions for summary judgment, and entered judgment for Respondents on Petitioners' counterclaim. The opinion of Judge Palmieri is dated July 25, 1967 (23a), and judgment was entered thereon in the office of the Clerk of the United States District Court for the Southern District of New York on the 29th day of August, 1967 (20a).

On March 5, 1968 the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court (391 F.2d 156) (4a).

The Supreme Court granted Petitioners' Writ of Certiorari on October 14, 1968.

Jurisdiction

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. 1254.

Statute Involved

Section 2, Eleventh of the Railway Labor Act (45 U.S.C. 152, Eleventh; Jan. 10, 1951, c. 1220, 64 Stat. 1238) reads as follows:

"Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any indi-

vidual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of

the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."

Question Presented

1. Whether train service employees may be required by a labor-management agreement to financially support a collective bargaining agent bearing the exclusive duty to represent said employees in all prospective crafts of train service?

Petitioners assert that the answer should be in the affirmative.

Statement of the Case

Representing, for all practical purposes, all train service employees of the Erie Lackawanna Railroad, the Petitioners negotiated and executed agreements with the Erie Lackawanna Railroad which, pursuant to Section 2, Eleventh (a) (45 U.S.C. 152 Eleventh (a)) of the Railway Labor Act, required employees to become members of the Brotherhood of Railroad Trainmen (hereinafter referred to as the

"Brotherhood"). While all statutory safeguards mandated in order to prevent discrimination were included in the union security agreements, the parties omitted to include a provision which would give the option to employees to satisfy their union shop obligation by paying dues to any other union.

The omission was based on the teaching of this Court in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 492 to 494, which gave the rationale for permitting alternative union shop membership to operating railroad employees, and the decision of the United States Court of Appeals for the Third Circuit, through which the railroad operates, in *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (1966).

The dicta in the *Rychlik* case and the holding in the *Rohrer* case were to the effect that the sole purpose of subdivision (c) of Section 2, Eleventh of the Railway Labor Act[1] was to prevent the imposition of compulsory dual unionism on operating employees who are traditionally exposed to seasonal intercraft transfers. Since, as in the *Rohrer* case, it was manifest that none of the employees could be involved in transfers, from the jurisdiction of the Brotherhood, the legislative *raison d'etre* for the inclusion of the subdivision (c) license was absent. The parties therefore omitted to furnish a contractual license to support a stranger to collective bargaining on the Erie Lackawanna Railroad in lieu of the agent charged with obligations to bargain on behalf of all the employees. (*Steele* v. *L. & N. R.R. Co.*, 323 U.S. 192; *Turnstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210; *Brotherhood of Sleeping Car Porters* v. *Thompson*, 367 F.2d 489 [4th Cir.]).

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[1] 45 U.S.C. 152, Eleventh (c).

The Respondents are employees of the Erie Lackawanna Railroad who successfully insisted below that subdivision (c) of Section 2, Eleventh conferred upon them a right to satisfy their union shop obligation by paying dues to a rival organization which did not represent any Erie Lackawanna employees. They successfully insisted that any union security agreement must spell out *in haec verba* the alleged right not to belong to or support the union which renders them service as collective bargaining agent.

Some of the Respondents are paying dues to an organization known as the Switchmen's Union of North America, AFL-CIO (hereinafter referred to as "SUNA"). Some of the Respondents are paying dues to an organization known as the Order of Railway Conductors & Brakemen (hereinafter referred to as "ORC&B"). Both of these are recognized labor organizations, national in scope, and organized in accordance with the Railway Labor Act.

Neither SUNA nor the ORC&B have at any time material to these proceedings been certified by the National Mediation Board as the bargaining representative of any employees of any class or craft on the Erie Lackawanna Railroad [90a].

Neither of these unions have at any time material to this proceeding been recognized by the Railroad as the exclusive bargaining agent for any employees of any craft or class performing services on the Erie Lackawanna Railroad [91a].

Neither of these unions have at any time material to these proceedings been a party to any collective bargaining agreement with the Erie Lackawanna Railroad [91a].

None of the Respondents contribute in any way to meeting the expense of maintaining the collective bargaining agent on the property [92a].

None of the Respondents hold employment rights with the Railroad in any craft or class other than those classifications which are exclusively represented on the Railroad by the Petitioners [92a].

ARGUMENT

POINT I

Congress did not intend to discriminate against the operating sector of the railroad industry.

The holding below institutionalizes competitive unionism in the operating sector of the railroad industry. It confers on dissident Trainmen an alternative not available to most other employees in the railroad industry,[2] and unavailable under the terms of union shop agreements in American industry generally [205a]. That alternative is to express their dissent by withholding economic support of their collective bargaining agent and instead financially supporting an absentee rival organization. The disadvantages flowing from such an interpretation may be summarized as follows [181a-185a, 220a-250a].

From the Standpoint of the Employee.

The union dues of most employees must be higher to compensate for the loss of dues paid to outside unions. If an employee is dissatisfied with union leadership his chances of changing that leadership are diminished by the circumstance that dissenters may belong to the rival organization. If he pays dues to the rival organization he is out of contact with his collective bargaining representative. From time to time, when there is a representa-

[2] Only train, engine, yard and hostling service employees have the alternative union shop license. (4, *supra.*)

tional election in which an attempt is made by the rival organization to take over the contracts, the employees are indirectly subjected to the extraordinary expense of public relations campaigns and inter-union combat.

From the Standpoint of the Union With the Collective Bargaining Agreement.

The union is compelled to perform services, without discrimination, without the financial support of those who are most critical of its efforts. The funds that are siphoned off are used to finance and organize the dissent to its efforts. (Cf. *International Association of Machinists* v. *Street*, 367 U.S. 739, 760, 764 [1951]).

From the Standpoint of the Carrier.

Competitive unionism imposes upon the Carrier a confrontation with a multitude of grievances and penalty claims which may be totally lacking in merit. Since employees allege a right to have their grievances presented by anyone of their choice, the grievance procedures become a kind of coliseum for the projection of extravagant grievance claims by the "switch shanty lawyers" who compete for union loyalty on the property.

Should an employee violate a union-management agreement or rule, no matter how blatant or outrageous the violation might be, the certified union is handicapped in any effort to impose discipline or otherwise cooperate with management in order to compel employees to carry out the terms of the agreement. In the event of union discipline, the employee would simply resign from the certified union and join the rival union.

From the Standpoint of the Public.

The primary purpose of the Railway Labor Act is to serve the public by minimizing the opportunities for work

stoppages in this critically necessary industry (45 U.S.C. 151(a) (1), (4), (5); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40). A strong minority enclave, without legal obligation, but with organization and finance, provides the perfect machinery for organizing illegal work stoppages, sick strikes, slowdowns, and similar acts of economic warfare.

There may be some countervailing virtues to competitive unionism under certain circumstances, but they were never mentioned or considered by Congress in the legislative history of Eleventh (c) (45 U.S.C. 152, Eleventh (c)). The legislative history of the Railroad Union Shop provision is reported as follows: Report No. 2262, 81st Cong., 2nd Sess.; Report No. 2811, 81st Cong., 2nd Sess.; Hearings before the Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789; 96 Congressional Record 15736, 16261, 16268, 16328, 17055 [198a-204a, 210a-219a].

Nowhere in that legislative history can there be found any evidence of an intention to perpetuate inter-union strife as a solution to the practical problem of seasonal intercraft transfers. Union shops had been found salutary instruments of national labor policy (29 U.S.C. 151, 158(a)(3), 159(a)). The railroad industry did not enjoy the benefits of the union shop [203a]. The Congressional effort was to rectify this inequity and provide a remedy whereby the railroad industry could bring itself on an equal footing with other industries in the matter of industrial organization so that they could negotiate union shops. The virtues, if any, of preserving competitive unionism were certainly never considered by Congress,

and the Respondents are challenged to direct the Court to a single question or answer or comment which would suggest that such an important deviation from a coherent and orderly national labor policy was ever considered by Congressmen, Senators, or even a witness. The Courts should expect to find some basis for incorporating an interpretation which is at war with the concept of a coherent national labor policy. (See *National Woodworkers Association* v. *Labor Board,* 368 U.S. 612; *Local 1976, Carpenters Union* v. *Labor Board,* 357 U.S. 93, 99, 100; *N.L.R.B.* v. *Allis Chalmers Manufacturing Co., Inc.,* 388 U.S. 175.)

Instead, one finds the Courts below gratuitously giving particularly discriminatory treatment to the most critical sector of the vital transportation industry.

Petitioners seek to interpret the alternative union shop license restrictively so that it would service the particular situation for which it was designed and no more.

The Courts below, however, have legislated competitive unionism into an institution even though there is no evidence that the Congress considered the virtues or vices of such an unusual policy.

POINT II

Eleventh (c) was designed to serve a pragmatic purpose and must be interpreted pragmatically.

Although union shop agreements have been authorized since 1951, there has never been any proposal for a *national* agreement on this subject by any operating union.

There are five unions representing the crafts of services involved in operating railroading. These are: the Brotherhood of Railroad Trainmen (BRT), the Switchmen's Union of North America (SUNA), the Order of Railway Conductors and Brakemen (ORC&B), the Brotherhood of Locomotive Firemen and Enginemen (B.L.F.&E.) and the Brotherhood of Locomotive Engineers (B.L.E.).

The operating services in railroading are subdivided into train service and engine service. The crafts in train service are the Conductors, Brakemen and men performing operating services in the yards. The crafts in engine service are the Engineers and the Firemen.

There is no central hiring hall in railroading, nor typically are there floaters from railroad to railroad. A man's seniority dates from the date when he is employed in his craft by the railroad for which he performs services. Men usually stay with their hiring railroad until their death or retirement.

Seniority rights exist entirely independent of union membership.

In train service an employee may hire on as a Brakeman and eventually he may qualify as a Conductor. His seniority with his employer as a Brakeman dates from his employment as a Brakeman, and his seniority with his em-

ployer as a Conductor is dated from the first day that he worked as a Conductor. The rate of pay for Conductors is higher than the rate of pay for Brakemen, and sometimes an employee's seniority as a Conductor will permit him to work as a Conductor. When his seniority as a Conductor does not permit him to obtain attractive employment as a Conductor he may then revert to working in the original craft in which he was hired, to wit: a Brakeman, and select the position to which his higher seniority as a Brakeman entitles him.

The Brotherhood of Railroad Trainmen, the largest of the operating train unions, traditionally represents employees in all classes of train service, that is, the Conductors, the Brakemen, and the yard employees. On the Erie Lackawanna Railroad, in particular, the Brotherhood of Railroad Trainmen was the exclusive bargaining agent for all train service employees. On some railroads in the United States, however, the Brotherhood of Railroad Trainmen does not represent all train service employees. On some railroads the SUNA represents certain yard employees. On some railroads the ORC&B represents the Conductors.

The operating unions are entitled to have 5 representatives on the ultimate tribunal for the disposition of minor disputes in the railroad industry (145 U.S.C. 153 First (h) First Division).

Every labor-management contract, however, is executed by an individual railroad, as employer, and a particular collective bargaining agent. There never has been national bargaining over union security issues.

When, in 1950 and 1951, the amendment to the Railway Labor Act authorizing union shop agreements was up for legislative consideration the language of Eleventh (c) was drafted for one purpose and one purpose only. That

simple, pragmatic purpose was to permit, unhindered, the advantages that would flow both to the railroad and to the employees in allowing employees to work as both Firemen and Engineers from time to time and as Conductors and Brakemen from time to time. This is the pragmatic peculiarity referred to as intercraft mobility, and the problem was to find a method of making intercraft transfers compatible with the union shop. Eleventh (c) had no other purpose.

If a man wished to belong to two unions that, of course, would be alright, but the purpose was to prevent *compulsory* dual unionism.

The language finally selected to solve that problem has a built-in ambiguity. Were the draftsmen thinking in the specific terms of the collective bargaining practices in the railroad industry? Petitioners urge that they were. They knew that *a railroad* employs its employees to render service over an extended period of time, usually until their retirement; they knew that the overwhelming proportion of the rules governing working conditions are hammered out with *the individual railroad* as the bargaining agent. If the draftsmen were thinking in terms of these realities then the language selected means that an operating employee may satisfy his union shop requirement by maintaining membership in any of the operating unions that could represent him or could render him collective bargaining services, either in the craft in which he was hired or any craft to which he might be promoted *on the railroad.* This would mean that the union which he sought to make the beneficiary of his dues would have a viable collective bargaining presence with his employer and would be in a position to potentially render him service.

The vast preponderance of collective bargaining activities in this country are carried out by an intricate complex of local and general committees bargaining on a man to man basis with individual railroads (Thirty-second Ann. Rept. of the National Mediation Board (1966), p. 45).

The interpretation that was placed upon Eleventh (c) by the Courts below has a rationale predicated on a view of operating railroad labor as being composed of five monolithic structures, each of which perform substantial services in collective bargaining for all of the employees in the crafts or classes which they traditionally represent on a continuing basis. But this predicate has little, if any, relationship to the real collective bargaining that is carried on in the railroad industry in terms of man hours of effort, or number of agreements concluded. Collective bargaining in the railroad industry is largely non-national and each individual railroad is, in fact, the traditional collective bargaining unit in railroading. There are no national union shop agreements in the railroad industry.

The frame of reference appropriate to an understanding of the literal authority of Section Eleventh (c) is not the nation, but the locus where the agreements are made, to wit: the unit made up of the hiring railroad and the collective bargaining agent.

It follows that the manifest desire of Congress and the unions to authorize a union shop agreement for the operating sector of the railroad industry to the fullest extent possible, without doing violence to the counter interest of avoiding compulsory dual unionism, can be accomplished without substituting national competitive unionism for the union shop and without creating *ad hoc* problems for the courts.

When a union has no collective bargaining presence or status on a particular railroad, Congress did not intend that the employee could join such a union and thereby satisfy his union shop requirement. The language used by Congress in Eleventh (c) assumes that the alternative union would be a collective bargaining entity on the particular railroad where bargaining for union security would be taking place.

In this particular case, it is a fact that the BRT represented all crafts of train service on the Erie Lackawanna Railroad. Whether the employee chooses to work as a Switchtender, a Conductor or a Brakeman the BRT is the duly authorized collective bargaining agent on his behalf. Conversely, no other union could negotiate any agreement with the Erie Lackawanna Railroad that would enure to his benefit or which would apply to him. Under these circumstances, a contract requiring train service employees to maintain membership in the Brotherhood of Railroad Trainmen as a condition to continued employment was not illegal.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to the District Court. The injunction and declaratory judgment should be vacated and the complaint dismissed.

Respectfully submitted,

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Proof of Service

I, ARNOLD B. ELKIND, Attorney for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Petitioners' Brief on Lee Leibik and Ruth Weyand, Attorneys for Respondents, by mailing said copies, via Air Mail, postage pre-paid, addressed to their office at 343 South Dearborn Street, Chicago, Illinois 60604.

Dated this 25th day of November, 1968.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by The Chicago, Milwaukee, St. Paul & Pacific Ry. Co., and SWITCHMEN'S UNION OF NORTH AMERICA, an Unincorporated Association,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by The Chicago, Milwaukee, St. Paul & Pacific Ry. Co., and SWITCHMEN'S UNION OF NORTH AMERICA, an Unincorporated Association,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The corrected opinion of the United States Court of Appeals is reported at 391 F. 2d 289 (A. 111). The findings of fact and conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division, are not officially reported (A. 102).[1]

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court and remanding the cause for further proceedings consistent with the opinion was en-

[1] They are unofficially reported at 65 Labor Relations Reference Manual, p. 2513 (BNA, Washington, D. C.).

tered on February 12, 1968 (A. 122). An order was entered on May 13, 1968, by Mr. Justice Thurgood Marshall extending the time for filing a petition for a writ of certiorari to June 10, 1968. The petition for a writ of certiorari, filed on June 7, 1968, was granted on October 14, 1968. The jurisdiction of this Court rests upon 28 U. S. C., § 1254 (1).

STATUTE INVOLVED.

The relevant provision of the Railway Labor Act ("Act") is Section 2, Eleventh, 64 Stat. 1238, 45 USC, § 152, Eleventh:

> "Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly

required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which

he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

QUESTION PRESENTED.

A railroad and the exclusive bargaining representative of its yard and certain train service employees entered into a union shop agreement requiring such employees to belong to their statutory bargaining agent or to any one of the labor organizations national in scope and organized in accordance with the Act that contracts with the railroad for employees in such services. The question presented is whether this union shop agreement violates the Railway Labor Act if its obligations are not satisfied by membership in a rival, minority union that supports a labor member on the First Division of the National Railroad Adjustment Board, but does not contract with the railroad.

STATEMENT.

Petitioner Brotherhood of Railroad Trainmen ("Trainmen") has, since 1926, served as the duly designated exclusive bargaining representative of yard service employees of petitioner Chicago, Milwaukee, St. Paul & Pacific Railroad Company on its Lines East ("Carrier") (A. 102, ¶ 1; 112).[2] Through its General Grievance Committee[3] chaired by petitioner Elmer L. Dirks, the Trainmen negotiates and administers comprehensive collective bargaining agreements setting forth the rates of pay, rules and working conditions for all of the Carrier's yard service employees. These representation activities are financially supported only by employees of the Carrier who belong to the Trainmen (A. 103, ¶ 2).[4]

The Trainmen and respondent Switchmen's Union of North America ("SUNA") are each "national in scope"

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[2] Except for the Order of Railway Conductors & Brakemen ("ORC&B") which bargains collectively for the Carrier's conductors, the Trainmen is the statutory representative of all of the Carrier's employees in yard and train service, including brakemen, flagmen and baggagemen as well as yard foreman, helpers and switchtenders. The Brotherhood of Locomotive Engineers ("BLE") and Brotherhood of Locomotive Firemen and Enginemen ("BLF&E") represent the crafts of engineers and firemen on the property. Thirty-third Annual Report of the National Mediation Board for Fiscal Year Ended June 30, 1967 ("33d Annual Report"), p. 98.

[3] "The local chairmen [of the grievance committees of the subordinate lodges] on a single railroad . . . comprise the general committee that is in charge of the collective bargaining and grievance work on that line. The chairman of a general committee is the most important union functionary on the road, except when, at his request, an officer of the Grand Lodge is sent on the property to assist him." Seidman, *The Brotherhood of Railroad Trainmen* (J. Wiley and Sons, 1962), pp. 2-3.

[4] "The office of the general chairman, along with the other expenses of the general committee, is financed by a general grievance assessment upon all members under the committee's jurisdiction." It is normally the largest component of the levy upon the membership. Seidman, *op. cit.*, p. 32 and p. 28.

and "organized in accordance with" the Act. Each admits to membership yard service employees and designates one of the five labor representatives on the National Railroad Adjustment Board, First Division ("Adjustment Board" or "First Division") (A. 103, ¶ 3; 112).[5] However, the two organizations are rivals for yard service workers on the nation's railroads (A. 107, ¶ 7) and on November 14, 1966, after a campaign of soliciting representation authorizations from among the Trainmen's yard service membership,[6] SUNA petitioned the National Mediation Board ("Mediation Board") under Section 2, Ninth of the Act for a representation election on both lines east and lines west in which to wrest bargaining rights for these employees from the Trainmen (A. 105, ¶ 8).[7]

Since 1926, SUNA has not negotiated collective agreements with the Carrier, has not been certified or recognized as the bargaining agent for any of its employees, and has not had obligations under the Act to them (A. 104, ¶ 5; 106, ¶ 4). However, SUNA and the Trainmen have joined forces to "represent . . . their respective members . . . on occasion, in the negotiation of particular

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[5] The practice is for each of the "qualified" operating organizations (BLE, BLF&E, ORC&B, SUNA and the Trainmen) to designate one of its vice presidents to sit on the Adjustment Board (A. 67-68). "The NRAB procedures cost the . . . labor organizations only the salaries [i. e. time] of their representatives on the Board. . . . All other costs [including referee fees and expenses] are met by the taxpayers." The majority of First Division cases, and all of the important ones, are deadlocked and submitted to the referees." Mangum, "Grievance Procedures for Railroad Operating Employees", 15 Ind. & Lab. Rels. Rev. 474, 499, 487 (1962).

[6] Of course, nothing in the challenged union shop agreement precludes dissatisfied employees or rival unions from signing or soliciting these documents to support a petition to the National Mediation Board for a change in representatives (A. 40, 63; Pl. Ex. 7, A. 52). See Sec. 1206.2, NMB Rules and Regulations, 29 CFR, Ch. X.

[7] The petition was withdrawn after the district court decision herein, and no election was ordered.

agreements affecting employees on all Class I railroads" and in other matters "of common concern" (A. 104, ¶ 6). Although a SUNA local union has existed over the years for the Carrier's yardmen, its representation work has been limited to "several instances" when its officials processed grievances under the *Trainmen's* collective agreements before the Carrier's officers, and more recently to insisting that the Trainmen process certain grievances on behalf of the SUNA members it represents[8] (A. 105, ¶ 7, 60-61).

Of course, SUNA members contribute no money to the Trainmen's General Grievance Committee (A. 58) and, since SUNA lacks bargaining responsibilities, they need not financially support one of their own.[9] Because its dues vary in amount with the expense of collective bargaining on the property, SUNA is in a position to offer a cheaper membership to the Carrier's yardmen than their statutory representative must charge.[10] SUNA members employed

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[8] The parties modified their investigation rule to prohibit rival union representatives from processing grievances before the Carrier, subsequent to the instances when SUNA had done so (A. 60).

[9] Like the Trainmen, SUNA utilizes the general committee structure (A. 57-58, 43) but produced no evidence that it has ever maintained one for the Carrier's employees. Rather, local officers or vice presidents have handled grievances in the several instances it elected to process them (A. 59).

[10] Operating brotherhoods such as SUNA charge "nominal" dues and then a member "will pay an assessment to finance the activities of the general negotiating committee, known as the general grievance committee on the railroad where he is employed, and he will pay that monthly, and it will vary month by month, based on the expenses and work of that committee." Hearings Before the Committee on Interstate and Foreign Commerce, on HR 7789, 81st Cong., 2d Sess., p. 257 ("House Hearings"). This legislative fact caused Congress in Sec. 2, Eleventh, unlike the corresponding provisions of Taft-Hartley, 29 USC, § 158 (a) (3), to sanction union shop agreements compelling the payment of "assessments (not including fines and penalties)". *International Association of Machinists v. Street*, 367 U. S. 740, 766 (1961).

by the Carrier do not contribute their share of financial support to the Trainmen for the performance of its functions under the Act (A. 105, ¶ 7).

On November 16, 1966, several months after issuance of the Third Circuit's decision in *Rohrer v. Conemaugh and Black Lick R. R. Co.*, 359 F. 2d 127 (3rd Cir., 1966),[11] the Trainmen served notice on the Carrier for amendment of its union shop contract signed on June 9, 1953 (A. 112, Pl. Ex. 8, A. 53). That agreement, after requiring membership in the Trainmen, stated that this duty

> ". . . shall be satisfied if any employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the . . . Act and admitting to membership employees of a craft or class in train, yard, engine or hostling service, that is, in any of the services, or capacities, covered by Section 3, First, (h) of the Railway Labor Act, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board; provided, however, that nothing . . . shall prevent any employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of the services above specified" (Pl. Ex. 8, A. 53).

Under this agreement, which borrowed the "disarmingly clear" language of the statute,[12] a number of yardmen

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[11] *Rohrer* held lawful under Sec. 2, Eleventh (c) a union shop agreement that precluded an operating employee from satisfying its requirement by holding membership in an alternate union "national in scope" that did not contract with the railroad.

[12] *Pennsylvania Railroad Co. v. Rychlik*, 352 U. S. 480, 488 (1957). Rychlik, a trainman, resigned from the contract-holding union and was discharged after joining UROC, a rising new union not qualified under § 3, First. The Court held that § 2, Eleventh (c) "allows alternative union membership only in those unions . . . already qualified under § 3, First, as electors of the union representatives on the . . . Adjustment Board, and not member-

represented by the Trainmen, including the individual respondents, held membership in SUNA, even though it had not contracted with the Carrier for 40 years (A. 103, ¶ 3).

On February 1, 1967, the Trainmen and the Carrier entered into an amended union shop agreement drafted to limit alternative membership rights to those employees who would otherwise face the necessity of changing from one union to another when temporarily changing crafts:

> "Section 1.
>
> (a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *
>
> (b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East), covering employees of a craft or class in train or yard service; provided further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood" (Pl. Ex. 9, A. 54-55).

From the face of these provisions, yardmen know or can easily ascertain that they must belong to the Trainmen, except that those holding seniority rights in another class

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ship in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Act." 352 U. S. at 485. Before his discharge Rychlik also joined SUNA, but no question arising out of that membership was presented to the Court, 352 U. S. at 484, note 9.

in train or yard service, may choose between membership in the Trainmen and any other "qualified" labor organization having a labor agreement with the Carrier covering employees in such service.[13] Since SUNA lacks a labor agreement with the Carrier, membership in that organization could not satisfy the requirements of the union-shop agreement (A. 104, ¶ 5).[14]

SUNA and five of its individual members then brought this action for declaratory judgment, injunctive relief and damages, invoking federal jurisdiction to determine the validity of the amended union shop agreement under the Railway Labor Act, 45 USC, § 151 et seq. and 28 USC, § 1337 (A. 4).[15] After a trial on the merits but at the conclusion of the plaintiffs' evidence, the district court granted petitioners' motions to dismiss the complaint in its entirety, and entered judgment in favor of petitioners (A. 109-110).

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[13] Thus, the amended agreement leaves all train service employees and those yard service employees holding seniority rights as conductors open for membership solicitation by rival organizations who contract with the Carrier for employees in train or yard service, *i. e.,* the Trainmen and ORC&B. The agreement limits the choice to unions holding labor agreements covering train or yard service because seniority operates solely within such services but not between train or yard service and engine service. "Seniority Practices—Railroad Operating Employees and Other Industries", *Studies Relating to Operating Employees,* Appendix Volume III to the *Report of the Presidential Railroad Commission* (GPO, Washington, D. C. Feb. 1962), pp. 231-232.

[14] Questions involving the validity of petitioners' limitation of alternate membership to yardmen holding interchangeable seniority rights and to unions that contract for train or yard service employees are not presented on the facts here, since the individual respondents allege that they "desire to belong only" to SUNA and thus are aggrieved solely because SUNA does not contract with the carrier (A. 10).

[15] The district court overruled challenges to its jurisdiction based upon the exclusive jurisdiction of the First Division to interpret and apply labor agreements and of the Mediation Board to determine whether conduct has interfered with employee free choice in representation election under the Act (A. 38-42). Petitioners did not seek certiorari as to these questions.

Relying upon this Court's decisions in *Pennsylvania Railroad Co. v. Rychlik, supra,* and *International Association of Machinists v. Street, supra,* and the Third Circuit's decision in *Rohrer, supra,* the district court found that SUNA members were "free riders" that the parties could lawfully contract to eliminate (A. 105, ¶ 7). It also found that the amended agreement "adequately meets the narrow problem of intercraft mobility" on the property, namely "the necessity of changing from one union to another when an employee temporarily changes crafts" (A. 107, ¶ 6). Finally, the district court held, on the evidence presented, that petitioners had not amended the union shop agreement for the purpose of influencing any representation election that the Mediation Board might conduct (A. 105, ¶ 9).

On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment below and remanded the cause for further proceedings consistent with its view that Section 2, Eleventh (c) must be given a "literal reading", i. e., that a union shop agreement covering yard service employees must permit membership in any one of the five "qualified" operating service unions to satisfy its membership requirements (A. 115, 118). The court made its own reading of the legislative history of the 1951 union shop amendments of the Act, dismissing this Court's exhaustive analysis of the matter in *Rychlik* as "dictum" (A. 121), and found Congressional "protection" and "recognition" in Sec. 2, Eleventh (c) of a practice, during the years when union security was prohibited, of membership by a minority of a craft in a rival operating union and of frequent raiding among them (A. 117).

SUMMARY OF ARGUMENT.

Petitioners, a rail carrier and the statutory representative of its yardmen, have entered into a union shop agreement that required membership in the collective bargaining agency or in any one of the qualified labor organizations "having a labor contract with" the railroad. Respondent SUNA, a rival, minority union "national in scope and organized in accordance with the Act" that has not contracted with the railroad for over 40 years contends that Sec. 2, Eleventh (c) of the Act entitles any operating employee of the railroad to belong to SUNA or any one of the other four qualified unions that will admit him to membership.

Petitioners submit that, although the words of subparagraph (c) appear to go further, this language must be limited by construction to its very narrow purpose: to protect all employees from the necessity of changing from one union to another when he temporarily changes crafts. This Court's construction of subparagraph (c) in *Pennsylvania Railroad Co. v. Rychlik,* 352 US 480 (1957), is conclusive of that sole purpose. Contrary to the Court below, no broader aim can be inferred from Congress' failure to adopt the exact language initially proposed in committee hearings by the Trainmen or from the fact that the language of subparagraph (c) was ultimately agreed upon by certain railway unions. SUNA's view that operating employees are entitled to shop for membership among any one of five unions conflicts directly with the legislative purpose to permit contracts that stabilize labor relations by eliminating pockets of dissident unionism within the bargaining unit.

Moreover, a reading of subparagraph (c) to require that operating employees under union shop agreements be permitted to choose membership in competing unions without

collective bargaining responsibilities, defeats the basic purposes of the union shop amendments. Only statutory bargaining representatives, not unions without contracts, come within the controlling concern of the 1951 amendments. Except for support of the Adjustment Board, members of a qualified but non-contracting union share in none of the obligations that led Congress to authorize union shop agreements. Because unions that lack collective bargaining responsibilities are in a position to offer a cheaper membership than the statutory representative must charge, a requirement that their membership satisfy union shop agreements imputes to Congress a purpose to encourage operating employees to join unions without bargaining rights, at the expense of supporting their representative's performance of its functions under the Act.

Therefore, subparagraph (c) cannot be read literally. Its narrow purpose to prevent compulsory dual unionism must be harmonized with the basic provisions of the union shop amendments, mindful of the manifest purpose of Congress to authorize union shop agreements, like the instant one, that require operating employees to contribute their fair share of financial support to a bargaining representative that contracts for a craft in which they may work.

ARGUMENT.

I. SECTION 2, ELEVENTH (C) WAS ENACTED SOLELY TO PROTECT EMPLOYEES SUBJECT TO TEMPORARY TRANSFERS BETWEEN CRAFT BARGAINING UNITS FROM COMPULSORY DUAL UNIONISM.

In amending the Railroad Labor Act to add Sec. 2, Eleventh in 1951, Congress expressly lifted the 1934 prohibitions against union shop and checkoff agreements.[16] Convinced by the unions that the interests of industrial peace would be served by the elimination of "free riders", union shop was legislated for railroad workers on terms essentially similar to those governing other industries, i. e., agreements were authorized to compel all unit employees to belong to the union that negotiates their employment terms.

However, railroad workers were largely organized in craft units, and some, belonging to the union that negotiates for their craft, work temporarily in units for which other unions contract. This occurs principally in the case of firemen and engineers, brakemen and conductors, because of seasonal and other factors. In the absence of a provision accommodating union shop to this situation,

> ". . . such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs.

[16] Secs. 2, Fourth and Fifth of the Act guarantee railroad employees complete freedom to choose "to join or not to join" labor organizations and prohibited deduction of union "dues, fees, assessments, or other contributions" by any carrier. Sec. 2, Eleventh (d) amends "provisions in paragraphs Fourth and Fifth of this section in conflict herewith to the extent of such conflict."

> The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean the loss of seniority and union benefits." *Pennsylvania Railroad Co. v. Rychlik,* 352 US at 490."

The solution, enacted as Sec. 2, Eleventh (c), was to permit the fireman or brakeman, if temporarily promoted to engineer or conductor, to satisfy the union shop contract of those crafts by remaining a member of the union that represents the firemen or brakemen.

Petitioners submit that, although the words of Sec. 2, Eleventh (c) appear to go further, this was the sole reason for the alternate union proviso. Therefore, to claim its protection, employees may be required to choose membership only in an alternate union that contracts with the carrier. Only another union entitled to bargain on the railroad could make a union shop agreement that would possibly confront an employee with the problem of compulsory dual memberships, and only if he belongs to one that has statutory bargaining responsibilities to him will the paramount purposes of the 1951 amendments be furthered rather than defeated.

We shall first examine this Court's construction of Sec. 2, Eleventh (c) in *Pennsylvania Railroad Co. v. Rychlik,* 352 US 480 (1957), so that the statutory language is "read, not in a vacuum, but in light of the policies this Section was intended to serve." *Ibid,* p. 488.

A. This Court's Construction of the Statutory Proviso in Pennsylvania Railroad Co. v. Rychlik, 352 US 480 (1957), Is Conclusive of Its Sole Purpose to Prevent Compulsory Dual Unionism.

Section 2, Eleventh (a) authorizes carriers to make union shop agreements only with the statutory, i. e. ma-

jority, representatives of their employees and limits the required membership to "the labor organization representing their craft or class." Subparagraph (c) provides that the membership requirement of an employee in the operating services under an agreement made pursuant to Sec. 2, Eleventh (a) "shall be satisfied" if he "shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Act, and admitting to membership employees of a craft or class in any of said services . . ." To this exception there are two provisos. First, when a union shop agreement initially takes effect, an operating employee who does not belong to any one of the unions "national in scope", etc., "may be required" to join the union representing "the craft in which he is employed" on that date; and second, that no agreement "shall prevent an employee from changing membership in one organization to another organization admitting to membership employees of a craft or class in such services."[17]

Recourse to the legislative purpose of the language is appropriate even if the words of Sec. 2, Eleventh (c) appear to require that an operating employee must always be permitted to choose membership in "any" one of the five unions "national in scope".[18] Reliance upon the legislative purpose below the surface of the words, yet fairly a part of them, is warranted if the plain meaning of the language leads "to absurd or futile results."

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[17] Sec. 2, Eleventh (b) authorizes carriers to make checkoff agreements only with the statutory representatives of their employees and to pay the amounts deducted only to the "labor organizations representing the craft or class of such employees." Subparagraph (c) states that "no [checkoff] agreement shall provide for deductions from his [an alternate union member's] wages for periodic dues [etc.] . . . . payable to any labor organization other than that in which he holds membership."

[18] *National Woodwork Manufacturers Assn. v. Labor Board*, 386 US 612, 619 (1967).

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole', this Court has followed that purpose rather than the literal words."[19]

We ask that the Court continue to construe the words of Sec. 2, Eleventh (c) cautiously and purposively: in accord with the reasons "accepted by Congress" rather than historical practices or the unaccepted, supposed interests of its proponents.[20]

The legislative purpose and history of subparagraph (c) was before this Court in *Rychlik, supra,* and that decision contains an exhaustive and dispositive analysis of its "sole" and "very narrow" purpose:

> ". . . the purpose of Congress was not . . . to help dissident or rising new unions recruit new members. Rather, the sole aim . . . was to protect employees from the requirement of dual unionism in an industry with high job mobility." 352 US at 488 489.
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> ". . . the only purpose of § 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts . . . [It was not intended] to provide employees with a general right to join unions other than the desig-

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[19] *United States v. American Trucking Assns.*, 310 US 534, 543 (1940). Union shop legislation is unreasonable if it compels that an engineer be permitted to belong to a yardmen's organization in satisfaction of a membership requirement in engine service. It is futile if agreements authorized to require financial support for the collective bargaining agency have to be satisfied by membership in a union that does not collectively bargain. It is absurd if it requires union shop agreements that encourage membership in organizations lacking statutory responsibilities, at the expense of those that must fulfill them. See pp. 33-43, *infra.*

[20] *Street,* 367 US at 768. *Rychlik,* 352 US at 488.

> nated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility. This is made particularly clear when the provision is taken in the context of American labor relations in general. 352 US at 492-493.
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> ". . . [O]nce a union has lawfully established itself for a period of time as the authorized bargaining representative of the employees under a union shop contract, Congress has never deemed it to be a 'right' of employees to choose between membership in it and another competing union . . . The purpose of § 2, Eleventh (c) was simply to resolve the problem of intercraft mobility under railroad union shop contracts," 352 US at 494.

The opinion points to the proviso requiring a non-union employee to join the bargaining representative rather than "even such competing unions which are concededly national in scope" when a union shop agreement first takes effect, as "completely negat[ing] the argument that the purpose of the statute was to allow employees to *choose* between unions." 352 US at 492, note 29.

Though it pays lip service to the "intercraft mobility" language in *Rychlik*, the court below has rejected the "very narrow" dimensions that this Court has ascribed to the problem and, standing *Rychlik* on its head, finds that Congress "deliberately chose" to perpetuate pockets of dissident unionism for their own sake, "to avoid upsetting the balance of union power . . . within the bargaining unit" (A. 120). But subparagraph (c), *Rychlik* teaches, was not enacted to help unions that lost their majority, "due to an influx of transferees from another craft" or for any other reason, because the exception was not enacted to help unions. It was designed solely "to protect *employees* from the *requirement* of dual unionism," 352 US at 488-489. Its purpose was "simply to resolve the problem of intercraft mobility under railroad union shop *contracts*",

352 US at 494 (Emphasis ours). A union that has lost bargaining rights cannot contract for union shop, and unless a union shop contract requires the membership, "Congress has never deemed it to be a right of employees to choose between membership in [the bargaining representative] and another competing union", 352 US at 494. Once a union has lost bargaining rights on a property, Congress has never allowed its members to avoid contributing to the costs of collective bargaining, simply because they may desire to maintain internal union benefits. It follows that Congress intended to tolerate only so much of "a balance of union power" within a craft as was essential "to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee changes crafts," 352 US at 492.

Rohrer v. Conemaugh & Black Lick R.R. Co., 359 F. 2d 127 (3d Cir., 1966), following *Rychlik*, permits the statutory representative to tailor the right to belong to alternate unions to the actual problem of intercraft mobility existing on the property. There, because the bargaining agent represented all crafts and classes on the line, the court sustained a union shop agreement that precluded membership in any alternate qualified union, since Rohrer could not possibly be "faced with the dilemma of intercraft mobility", and in its absence, Congress did not mean "to provide a right to an employee under a union shop contract to choose between membership in the authorized bargaining representative and a competing union."[21] The instant union shop agreement, limiting alternate membership to unions that contract with the Carrier, fits precisely within the *Rohrer* holding, even though it covers a multicraft rather than an all-craft unit.

Petitioner's union shop contract, although it limits alternate membership rights to contracting qualified unions,

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[21] 359 F. 2d at 131, 130.

does not, as the court below believes, make the last proviso to subparagraph (c) "devoid of meaning" (A. 118-119). That proviso, prohibiting agreements that "prevent an employee from changing membership from one organization to another" qualified union, simply insures that operating employees will be:

> "open for solicitation by rival organizations . . . within the area where even a worker under a union shop contract can change affiliations, see *Pennsylvania R. Co. v. Rychlik,* 352 US 480, 492-494".
> *Felter v. Southern Pacific Company,* 359 US 326, 336, 337, (1959).[22]

An area for rivalry, for dropping membership in one contracting union and joining another, is inherent in the statutory purpose to accommodate intercraft mobility. But the perimeters of that area, as the Court emphasized in *Felter,* are set out in that section of the *Rychlik* opinion that limits subparagraph (c) solely to the exigencies of employees who shuttle back and forth under railroad union shop contracts.

The decision below holds *Rychlik* to be inconclusive as to the legislative purpose of subparagraph (c) because, as

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[22] Felter was a conductor on the Southern Pacific's Pacific Lines who dropped membership in the Trainmen under its contract and joined ORC&B. Though it was "not clear" to the Second Circuit in *O'Connell v. Erie Lackawana R. R. Co.,* 391 F. 2d 156, 163 (2d Cir. 1968) that ORC&B represented conductors on Felter's road, it is apparent from those Mediation Board annual reports showing bargaining rights closest to the period in question (April, 1957), that it did. 21st Annual Report, p. 75; 25th Annual Report, p. 89. Felter could arguably have been restricted, as a conductor, to "holding" a membership in the Trainmen acquired while a brakeman, were it not for the last proviso to subparagraph (c). The union shop agreement here, which invokes conditions implicit in the statutory purpose, similarly gives full effect to the last proviso by leaving train service workers and those yard service employees holding seniority rights as conductors, free to change membership from one contract-holding organization to another qualified contracting union.

we next discuss, the court was led astray as to the significance of Congress' failure to adopt certain statutory language proposed by the Trainmen and of its acceptance of language agreed upon by certain union proponents.

B. Congress, Although Failing to Accept the Exact Language Initially Proposed by the Trainmen, Enacted the Agreed-Upon Language of Sec. 2, Eleventh (c) Solely to Protect an Operating Employee Who Would Otherwise Face the Necessity of Changing From One Union to Another When Temporarily Changing Crafts.

The union shop bills first introduced before both committees by Railway Labor Executives' Association ("RLEA") spokesman George M. Harrison,[23] authorized agreements compelling all employees, without exception, to belong to "the labor organization representing the craft or class", unless the union refused admission "because of membership in any other labor organization."[24] Stressing that it would discourage raiding, unrest and the existing unhealthy "rivalry among train service organizations for the . . . support of the men", Harrison explained that his bill was designed to force all minority union members within a craft into the organization that held the contract. House Hearings, pp. 36, 41, 249. Trainmen spokesman Harry See, in his testimony, pointed out the dilemmas that would result from intercraft mo-

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[23] His statements have been deemed authoritative as to the purpose of the legislation. *Street, supra,* 367 US at 761. Since neither BLE nor the Trainmen belonged to RLEA at the time, Harrison spoke for the non-operating unions, SUNA, BLF&E and ORC&B. House Hearings, pp. 6, 89-90.

[24] Hearings Before a Subcommittee of the Committee on Labor and Public Welfare, on S. 3295, 81st Cong., 2d Sess. ("Senate Hearings"), p. 1, House Hearings, p. 1.

bility under ordinary union shop contracts, supported the purposes but opposed the language of the RLEA bills for this reason, and proposed to substitute an amendment of Sec. 2, Fifth with the following proviso:

> "provided that when two or more crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them." House Hearings, pp. 32-33, Senate Hearings, p. 69.

There was no "real difference", Harrison testified, between RLEA and the Trainmen as to the existence and limited scope of the problem, or its resolution by permitting membership in one contracting union by such workers to satisfy the union shop agreement of the other:

> ". . . what we had in mind . . . was that when the unions negotiated with the railway companies for the union-shop agreement . . . they would provide in the agreement that when men were temporarily promoted and not regularly assigned to the higher group, they would be regarded as still coming under the agreement where they hold their primary rights . . . We thought that we might get bogged down into a lot of detail if we undertook to write all of this details into law. You see, all we suggest here is that the present prohibitions in the law . . . be eliminated and that the parties be left free to negotiate out those questions . . ." House Hearings, pp. 35-36.
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> ". . . It was our thought that the man would join the union that held the labor contract where they had their primary employment rights, and if they

were just temporarily working as conductors because of a seasonal rush in business, they would not be required to join the conductors, because of not being regularly employed within that group. He would be a regular employee as a trainman. The same thing would hold true with the fireman * * * I understand, that some of these trainmen when they are promoted to conductors continue to hold their membership in the trainmen's organization for one reason or another, and they do not join the conductors. If this bill became law and we negotiated the kind of union shop agreement we are talking about, those fellows would be required to join the conductors." House Hearings, p. 79.

". . . as I understand Mr. See's proposal, if an employee were engaged in the train service he would be compelled to join one of the train-service organizations . . . [I]t is on that . . . proposition that we disagree with Mr. See. If there is any merit whatever to the bill now before you that I am supporting, it is that the employee should support the union that negotiates the contract for his wages and working conditions . . . If he wishes to affiliate with some other union that does not bargain for him, that is his business . . . [For those actually shuttling back and forth] we have got to work that out because it would be unfair . . . to compel the man to support the two unions . . ." House Hearings, p. 81.

The RLEA bill was reported favorably from both committees, with a comment in the House Report that "questions . . as to the status of employees who are temporarily promoted from one closely related craft or class to another . . should be resolved by negotiation and collective bargaining.[25]

[25] HR Rep. No. 2811, 81st Cong., 2d Sess., pp. 5-6.

The court below, and the Second Circuit in *O'Connell v. Erie Lackawanna Railroad Co.*, 391 F. 2d 156, 160 (2d Cir., 1968)[26] infer from committee rejection of the Trainmen's proposal that Congress did so to protect members whose union lost its majority and, generally, to recognize non-contracting unions under union shop agreements in the operating crafts. To the contrary, three essential conclusions emerge from the committee proceedings. First, the Trainmen's definition and ultimate solution of the intercraft mobility problem was accepted by all. Second, See's language was opposed, not from the standpoint that it failed to protect membership in non-contracting unions, but because it permitted employees primarily working under one union's contract to satisfy its union shop requirement by keeping membership in a union that contracted for another craft. Third, the legislators agreed that those "very difficult and vital" adjustments necessary to accommodate union shop agreements to "the intricacies of different types or character of employment" on the various properties, without compelling membership in more than one contracting union or permitting employees to avoid supporting the union that negotiates for their primary craft, should be left to negotiations among the unions and with the carriers.[27] In sum, as citation to See's testimony and the Trainmen's proposed language in *Rychlik* suggests, 352 US at 490, note 21, the committee proceedings in their entirety *support* the view that the only purpose of § 2, Eleventh (c) was to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts.

The proceedings on the floor of both Houses show merely that Congress concluded that certain employee

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[26] Certiorari granted October 14, 1968; No. 158, October Term, 1968.

[27] Rep. Dolliver, House Hearings, p. 36; Rep. Wolverton, House Hearings, pp. 40-41.

"safeguards" should be spelled out in the statute rather than left to the collective bargaining process, 96 Cong. Rec. 16329. When the bill was presented on the Senate floor, Senator Hill, its manager, offered a committee amendment to Sec. 2, Eleventh (a) providing that "no such agreement shall require membership in more than one labor organization", 96 Cong. Rec. 15735. In introducing the amendment, Senator Hill explained:

> "It is the intent of this proviso to assure that in the case of . . . [temporary] promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred." 96 Cong. Rec. 15736.

Literally, of course, no single agreement would require membership in more than one union; the problem of compulsory dual unionism arises when two or more contracts are juxtaposed and temporary intercraft transfers occur under them. Therefore, because of doubts by operating unions that "this amendment does what it says", Majority Leader Lucas, to make its legislative history unmistakable, referred to Senator Hill's "clear and convincing" explanation as the "true meaning or interpretation" of the amendment in an effort to "clear up" the controversy. 96 Cong. Rec. 15736.[28]

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[28] In support of its literal reading of subsection (c), the Second Circuit in *O'Connell, supra,* 391 F. 2d at 160, cites a statement by Senator Hill that an employee "could belong to as many different unions as he wished to . . . but . . . he cannot be required to pay dues to or belong to more than one union." Since this was merely to confirm, in the words of the question it answered, that "there is no prohibition within the bill that would deny anyone the right to belong to one or several organizations," the remark means no more than that the statute did not foreclose multiple memberships, if that is what the worker desired, and does not detract from

No action was taken on this amendment, due to an adjournment and because all standard operating unions but SUNA were still dissatisfied with the lack of "definiteness [in the language] of the protection afforded operating employees against being compelled to belong to more than one union," 96 Cong. Rec. 17059, 16261.[29] On December 6, 1950, the day before the amendment was offered by Senators Hill and Taft, representatives of the operating and non-operating unions met and except for BLE, reached agreement on the language of subparagraph (c), 96 Cong. Rec. 16189-16190.

In these circumstances, Senator Hill's explanation of its purpose should, as *Rychlik* indicates, 352 US at 492, be accorded particular weight. He explained that the language merely "carries out what was intended by the committee" in the previous amendment—"that no railway employee should have to belong to more than one union", 96 Cong. Rec. 16261:

> "The amendments do nothing more nor less than . . . what was the intent of the committee in offering its amendment, that no employee of a railroad should be required to belong to more than one labor organization. The only difference between the committee amendment and the amendments now before the

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his earlier, carefully prepared explanation of committee intent. 96 Cong. Rec. 15736. In any event, as Mr. Justice Frankfurter observes, a "loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical." Frankfurter, "Some Reflections on the Reading of Statutes", in *The Record of the Association of the Bar of the City of New York,* Volume 2, No. 6 (1947), p. 234.

[29] At least one of them (BLE) also feared that a "union card in the waiter's union" might be construed to satisfy the membership requirement of union shop contracts "in the other 127 different crafts and/or divisions of crafts" of railroad employees. 96 Cong. Rec. 17052.

> Senate, . . . is that [the latter] . . . spell out in much more detail the purposes of the committee amendment than did the committee amendment. But the intent and purpose of the [two] . . . are exactly the same." 96 Cong. Rec. 16268.

Based on this explanation, the amendment was added to the bill on December 7, 96 Cong. Rec. 16268.[30] The following day, Senator Hill rejected the notion, expressed by an opponent of the bill, that the amendment "completely changed its application in important fields" by making "membership in one union among the operating brotherhoods sufficient":[31]

> "I wish to repeat what I said yesterday, namely there is no difference between the intent of the amendment reported by the committee and the intent of the amendment which the distinguished senior Senator from Ohio and I offered yesterday and which the Senate adopted." 96 Cong. Rec. 16322.

Rather, when asked what "additional requirements" his measure would impose on promoted members of the firemens' union or demoted members of the engineers' union, Senator Hill repeatedly emphasized that union shop

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[30] Immediately afterwards, Senator Hill again emphasized the limited dimensions of the problem: ". . . a man may be a brakeman today and may be promoted to be a conductor tomorrow, and he may be a conductor for 30, 60 or 90 days, and then he may be dropped back to be a brakeman again. He might be a fireman today; but tomorrow he might be promoted to be an engineer . . . for 90 days or 120 days . . . and then . . . demoted to fireman. . . . The only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union." *Ibid.*

[31] Therefore, the weight given this remark in the Second Circuit's *O'Connell* opinion, 391 F. 2d at 161, is unwarranted, not only because Senator Holland was a staunch foe of the bill, but because its floor manager immediately repudiated that implication as to its intent.

agreements could limit the choice to "one or the other of these two organizations."[32] After these unequivocal assurances of the sole intent of subparagraph (c), the bill survived several requests that it be returned to committee for further consideration of its meaning and effect on unions in the operating crafts, 96 Cong. Rec. 16331, and passed the Senate as S. 3295 on December 11, 1950, 96 Cong. Rec. 16378.

The House agreed to substitute S. 3295 for the bill reported from its committee under a special rule prohibiting amendment, debated and passed it on January 1, 1951, 96 Cong. Rec. 17059, 17062. Discussion of subparagraph (c) on the House floor is, we submit, completely consistent with the limitation to contracting unions implicit in its purposes. Calling it "the provision against double membership", Representative Hugh Scott said it was enacted "to prevent employees who regularly move back and forth between various crafts from being required to join more than one union", 96 Cong. Rec. 17055-56. Representative McGuire, who reported the bill to the House on behalf of the Committee on Interstate and Foreign Commerce, was explicit in limiting the choice afforded by subparagraph (c) to unions with bargaining rights on the property.[33] And Representative Harris' remarks,

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[32] "Under this measure, if there were a collective bargaining agreement he would have to belong to one or the other of those two organizations . . . The choice would be his." "Under the bill as now amended, if an employee is now a member of the fireman's organization [but goes to work as an engineer], he has a right to make his choice as to whether he will remain in that organization or move up to the engineer's organization." 96 Cong. Rec. 16329.

[33] See HR Rep. No. 2811. McGuire stated: ". . . the bill now before the House S. 3295, is substantially identical to the bill reported by our Committee, the only difference being language agreed to by the railway labor organizations themselves, for the purpose of clarifying the section dealing with union membership requirements, where employees hold rights in more than one class or craft, *and where different organizations hold the bargaining rights*

that a "possible requirement of dual membership" was "specifically" resolved by subparagraph (c), do not reflect a broader purpose that others had discussed, 96 Cong. Rec. 17059.

Therefore, although the exact language initially proposed by the Trainmen limiting alternate membership to contracting unions does not appear in subparagraph (c) as adopted seven months later, the proceedings in both houses, like the committee hearings, do not expand the scope of the very narrow problem it raised nor reflect a legislative purpose to limit union shop more than was essential to resolve it. The initial committee amendment modified the committee's approach, permitting the parties to work out the "intricacies" of the problem on the properties, only to the extent that it prohibited an agreement from requiring membership in more than one union.

In contrast, the Trainmen's proposal would not only have extended alternate membership rights to all railway employees in all unions but have precluded the parties from compelling an employee who worked primarily in one craft from supporting his bargaining representative. The final amendment, agreed upon at the last minute, was accepted as merely a recasting of the imprecise prohibition into an affirmative employee right and a "fencing out" of employees and unions that were not concerned with the problem. It was, as Senator Hill said, "exactly similar to the committee amendment, except that it spelled out in more detail the *safeguards* which were deemed necessary in order to properly do the job." 96 Cong. Rec.

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in such crafts or classes. This generally applies to what is termed train and engine service employees. *Under such circumstances,* such an employee could not be required to hold membership in more than one *such* organization. The very fact that these organizations worked this out for themselves for the protection of the individual employee demonstrates their sincerity and good faith." 96 Cong. Rec. 17058 (Emphasis ours).

16329. (Emphasis ours.) The "national in scope" limitation on the unions to which an employee may transfer or in which he may remain had "no effect on the purpose of the amendment . . . [except to assure] that Eleventh (c) would not become a device by which a new or rising union could lure away employees who were already represented by a qualified labor organization" *Rohrer v. Conemaugh & Black Lick R. R. Co., supra,* 359 F. 2d at 131; *International Association of Machinists v. Street, supra,* 367 U. S. at 764, note 15.

Congress enacted the bill to extend to railway labor union shop rights on the same terms as previously had been extended to employees and employers in the Labor Management Relations Act,[34] and both Houses relied upon Senator Taft's assurance, after the language of subparagraph (c) had been worked out, that the bill which included it gave railroad unions "almost the exact provisions, so far as they fit, of the Taft-Hartley law", 96 Cong. Rec. 16267, 17054. With respect to subparagraph (c) in particular, Senator Hill explained that, simply because of a "peculiar situation" in the railroad industry, the amendment was necessary to make the railway union shop "coincide" with the provisions of Taft-Hartley, 96 Cong. Rec. 16268.[35] Since competitive unionism under union shop agreements is impossible under the Taft-Hartley provisions,[36] we submit that the sole purpose accepted by Congress for subparagraph (c) was simply what the legislature said it was—to protect operating

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[34] HR Rep. No. 2811, p. 4; S. Rep. No. 2262, 81st Cong., 2d Sess., p. 3 (1950). Wellington, *"Machinists v. Street*: Statutory Interpretation and the Avoidance of Constitutional Issues," 1961 *Sup. Ct. Rev.*, pp. 55, 59: "The statutes are twins."

[35] See also 96 Cong. Rec. 16323.

[36] Levinson, "Union Shop Under the Railway Labor Act", 6 Lab. L. J. 441, 444, 452.

employees who would otherwise face the necessity of changing from one union to another when temporarily changing crafts.

C. The Congressional Purpose in Sec. 2, Eleventh Was Not to Foster 'Union Shopping' But to Authorize the Contracting Parties to Stabilize Their Labor Relations by Making Agreements That Eliminated Pockets of Dissident Unionism.

The decision below not only imputes to the alternate union proviso a purpose that Congress never accepted, it is one directly contrary to a declared aim of the statute. By 1934 operating employees on Class I railroads were almost fully organized in the national unions:[37] Thereafter, SUNA was in "continuous jurisdictional conflict" with the Trainmen over yardmen.[38] BLE and BLF & E were "traditional rivals of each other as is equally true" of ORC & B and the Trainmen.[39] Congress did indeed legislate Sec. 2, Eleventh with the history of representation disputes and rivalry among operating unions in mind.[40]

Unhealthy union rivalry, Harrison testified, existed in particular "among train service organizations", House Hearings, p. 37; and union shop agreements would discourage it by eliminating the pockets of dissident unionism that served as its base:

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[37] Lecht, *Experience Under Railway Labor Legislation* (Col. U. Press, New York, 1955), p. 154.

[38] Kaufman, *Collective Bargaining in the Railroad Industry* (Kings Crown Press, Col. U., New York, 1954), p. 50.

[39] Levinson, "Railway Labor Act—The Record of a Decade", 3 Lab. LJ 13 at 26-27 (Jan., 1952). "There is a competing zeal between the unions almost to the same intensity as businessmen compete for sales, and the continued contracting of employment opportunities will serve to buttress that rivalry in the long run."

[40] *O'Connell v. Erie Lackawanna, supra,* 391 F. 2d at 162.

". . . the fact that all of the members of a craft or class may be required to join a union as a condition of employment will do much to discourage raiding by other labor organizations. The rivalry between unions will be decreased rather than increased by reason of the fact that the class or craft will be fully organized and all members will belong to the organization representing the members of such class or craft." 96 Cong. Rec. 16264; House Hearings, p. 249.

Harrison's prepared statement to both committees repeatedly emphasized that union shop agreements would promote stability in railroad labor relations by discouraging competition from rival unions without bargaining responsibilities:

"Representation disputes should be reduced under union shop conditions." "The grievance procedure will cease to be a battleground for rival unions." "The union shop makes it more difficult for one union to raid another and thus eliminates or reduces weeks and months of turmoil . . . Employees who participate, through membership, in the formulation of their own . . . working conditions will be much less susceptible to irresponsible appeals and unjustified criticism of rival unions. Where all employees are members . . ., it is just as easy to change the policies . . . as it is to change the collective bargaining representative." House Hearings, pp. 10-11; Senate Hearings, pp. 16-17.

Senator Hill alluded to these considerations in urging its passage "to secure . . . stable, orderly and harmonious relationships between [railway] management and labor." 96 Cong. Rec., 16377.

The court below concludes that Congress legislated to accomplish precisely the contrary result: to "intensify the rivalry among existing standard unions" in the very

sector where it had caused the most concern.[41] Wholly without support in the legislative proceedings, the view that subparagraph (c) was enacted to foster minority unionism for its own sake rests merely upon gratuitous supposition as to the motives of unions who agreed to its language. Rather, Sec. 2, Eleventh represents a "choice by the Congress of the union shop as a stabilizing force", to secure "[i]ndustrial peace along the arteries of commerce", *Railway Employe's Dept. v. Hanson,* 351 US 225, 233 (1956). Because competitive unionism within the bargaining unit conflicts with that purpose, Congress "has never deemed it to be a 'right' [of employees under union shop agreements made by the statutory representative] . . . to choose between it and another competing union"; and its deliberations here show no departure from precedent "except to meet the narrow problem of intercraft mobility", *Rychlik,* 352 US at 494.

II. A READING OF SUBPARAGRAPH (C) TO REQUIRE THAT OPERATING EMPLOYEES UNDER UNION SHOP AGREEMENTS BE ENTITLED TO CHOOSE MEMBERSHIP IN COMPETING UNIONS WITHOUT COLLECTIVE BARGAINING RESPONSIBILITIES DEFEATS THE BASIC PURPOSES OF SEC. 2, ELEVENTH.

Unlike other parts of the Act, the union shop amendments were not added to the statue by agreement of the carriers and the standard railway labor organizations, or even by unanimous agreement of the latter. Rather, they were opposed by virtually all carrier representatives and, among the unions, the attenuated dispute over the alternate union proviso, probably the most controversial pro-

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[41] "Prior to the enactment of the union shop amendment, an employee could reject membership in any union. But, under the present law, if one union does not obtain his membership, another must." Levinson, "Union Shop Under the Railway Labor Act", *supra,* 6 Lab. LJ 441 at 448.

vision of the amendment has already been described. Its disarmingly specific language, never considered in committee hearings, drafted just before the full measure was voted on, and touching the sensitive nerve of union security, therefore represents "labor legislation . . . [that] is peculiarly the product of legislative compromise of strongly held views", *Labor Board v. Allis-Chalmers Manufacturing Company,* 388 US 175, 179 (1967), and for this reason, invokes the "familiar rule that a thing may be within the letter of the statute and yet not within the statute; because not within its spirit, nor within the intention of its makers", *Holy Trinity Church v. United States,* 143 US 457, 459 (1892); *National Woodwork Manufacturers Assn. v. Labor Board,* 386 US 612, 619, 620 (1967).

The makers of the 1951 amendments as we shall now demonstrate, contemplated compulsory unionism to require operating employees, like other railroad workers, to share the costs of negotiating and administering collective agreements and adjusting disputes. It was not enacted to require that the contracting parties tolerate "free riders" belonging to non-contracting organizations whose dues merely finance dissident activities or none at all. It was certainly not enacted to *encourage* unit employees to choose membership in a union that lacks statutory responsibilities rather than the one that is legally obligated to perform them. Yet all of these results flow from the decision below. Therefore, the alternate union exception must be harmonized with the basic statutory provision, mindful of the manifest purpose of Congress to fashion a coherent national labor policy.

A. Only Statutory Bargaining Representatives, Not Unions Without Contracts, Come Within the Controlling Concern of the 1951 Amendments.

The controlling congressional purpose in enacting Sec. 2, Eleventh was, as its terms disclose, to authorize the making

of contracts that would require all unit employees to contribute financial support to their statutory bargaining representative. That essential concern is expressed in Sec. 2, Eleventh (a) which permits such agreements to be made only by the statutory representative and only if membership is required in that labor organization. Under Sec. 2, Eleventh (b) only the statutory representative is permitted to make or be paid membership monies under checkoff agreements. *Hanson, supra,* holds that Sec. 2, Eleventh was constitutionally enacted to permit agreements that compel "financial support of the collective bargaining agency by all who receive the benefits of its work", 351 US at 238. *Hanson* rejected a constitutional challenge based upon forced association, *Street* emphasizes, "only" because Sec. 2, Eleventh is limited to "contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." 367 US at 749.

Implicit in *Hanson* but explicit in *Street* is the view that the statutory responsibilities of the exclusive bargaining agent, and primarily its duty of fair representation, must control in interpreting Sec. 2, Eleventh, since these considerations were "decisive with Congress", 367 US at 762. Analysis of "the legislative history in the context of the development of [railroad] unionism under the [Act's] regulatory scheme," 367 US at 750, led this Court to a "not only 'fairly possible' but entirely reasonable"[42] limitation on the use of monies exacted under agreements permitted by the "broad language"[43] of Sec. 2, Eleventh. Because this history also shows the controlling purpose with which subparagraph (c) must be harmonized, we shall briefly summarize it here.

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[42] The construction was, therefore, not necessary because of the "serious doubt of constitutionality" rule.

[43] Dissenting opinion of Mr. Justice Black, 367 US at 784.

The history of union security on the railroads reflects a "firm legislative policy" against compulsory unionism, modified "only as a specific response" to recognition of the expenses incurred by an exclusive bargaining representative in fulfilling its statutory functions, 367 US 750-751. Before 1934, union security agreements existed principally where company unions had been installed. In 1934, the Act was amended to prohibit all union security and checkoff, after the standard unions failed to convince Congress to outlaw such contracts only if made by company unions, 367 US at 752.

In other amendments, however, Congress guaranteed the right of railroad and airline employees to organize and bargain collectively through independent, effective labor organizations and required carriers "to treat with" the duly designated bargaining representatives selected by a majority of any craft or class, 367 US at 759. By depriving individual employees and members of a minority union "of the right . . . they would otherwise possess" to choose any other to represent them, the amendments charged the exclusive representative with the duty of representing all employees in the craft or class, including "non-union or minority union members without hostile discrimination, fairly, impartially and in good faith."[44] In addition, the 1934 amendments created the National Railroad Adjustment Board, empowered to settle minor disputes in the industry, and provided that the 18 employee representatives of all of its divisions be chosen, and their salaries and expenses paid by, the labor organizations national in scope, 367 US at 760.

It was "essentially unfair", the unions argued, for an employee not to contribute his share towards the costs of the activities "resulting in the procurement of employee benefits", when the "collective bargaining repre-

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[44] *Steele v. Louisville & Nashville R. R. Co.*, 323 US 192, 200-204 (1944).

sentative . . . from whose existence and activities he derives most important benefits . . . is obligated by law to extend these advantages to him." It was particularly unjust, they added, because the statutory bargaining representative of railroad employees incurred more costs than unions in other industries because of the Act's "more complete and . . . complex administrative machinery", its mediation, arbitration and Presidential Emergency Board provisions, and its terms for maintenance of the Adjustment Board, 367 US at 761-762.

Because the statutory responsibilities of the exclusive bargaining representative were "the reasons advanced by the unions and accepted by Congress," 367 US at 768, *Street* holds that construction of Sec. 2, Eleventh must be commensurate with and respond to the scope of the duty fairly to represent all employees in the craft or class.

> ". . . [Congress] contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 US at 764.

That duty is held only by the statutory bargaining representative and extends to minority union members as well as non-union employees in the craft, since the carrier is under an "affirmative duty to treat only with the true representative and hence the negative duty to treat with no other," *Virginian Ry. Co. v. System Federation No. 40*, 330 US 550 at 548 (1937).

Nevertheless SUNA claims to come within this purpose because its members employed by the Carrier support (1) officials who have in "several instances" processed their grievances under the Trainmen's contract and (2) representatives who have joined forces with the Trainmen in "concerted" negotiating movements and other efforts.

These contentions have not been accepted by the courts below, and properly so. The handling of grievances by persons who owe no duty to the unit as a whole, who are strangers to negotiation of the contract, with whom the Carrier may or may not "treat" as its interests dictate, and who lack legal authority or obligation in the "continuing process" of "day to day adjustments of the contract, and other working rules [or the] . . . resolution of new problems not covered by existing agreements"[45] not only conflicts with national labor policy[46] but, because gratuitous, lacks the element of reciprocal obligations that was central in the legislative concern.

Both organizations may have seen fit jointly to serve on various boards[47] or to participate, on occasion, in the negotiation of particular national agreements, but since the Trainmen exclusively represent the Carrier's yardmen, SUNA members among them are not sharing in the

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[45] *Conley v. Gibson,* 355 US 41, 46 (1957).

[46] The Labor Board, with judicial approval, has held that it is unlawful for an employer to entertain a unit employee's grievance presented or processed by a union other than his statutory bargaining representative, because it "effectively disrupt[s] the peaceful application of majority rule." *Federal Telephone and Radio Company,* 107 NLRB 649, 653; *The Youngstown Cartage Co.,* 146 NLRB 305, 307; *Hughes Tool Co. v. Labor Board,* 147 F. 2d 69 (5th Cir. 1945). But see *Douds v. Local 1250, Retail, Wholesale, etc. Union,* 173 F. 2d 764 (2d Cir. 1949); and the remarks of its critics in 63 Harv. L. R. 361 (1949) and Sherman, "The Individual and His Grievance—Whose Grievance Is It?", 11 U. Pitt. L. Rev. 35, 38, 55 (1949).

[47] Like other railway organizations, both support through a per capita assessment the activities of RLEA, a private organization of the presidents of the "standard" railroad labor unions, nonoperating, as well as operating, to formulate and sponsor national legislative and policy programs of common concern (A. 104-105, ¶ 6). Since it is chiefly concerned with legislative matters on the federal level, RLEA activities are at best an expense peripheral rather than "germane to collective bargaining" under *Brotherhood of Railway and Steamship Clerks, etc. v. Allen,* 373 US 113, 121, note 7 (1963) and *Street.* See Kaufman, *op. cit.,* p. 47.

cost of their representative's performance of its functions. Nor would these joint efforts, contrary to SUNA'S claims, explain why Congress would have legislated a "multi-union" union shop solely for operating employees. National "job protection" agreements, retirement benefits and unemployment compensation plans were negotiated by all "standard" railroad employee organizations, operating and nonoperating.[48] While these standard unions have, from time to time, presented their wage and rule demands in "concerted movements," the number of participants and their alignment has been fluid and "even the five operating unions have not been a cohesive group."[49] Although national bargaining on the grand lodge or international union level has increased in importance over the last thirty years, there has been no atrophy of collective bargaining at the level of the individual carrier or loss of autonomy or responsibility by the exclusive bargaining representative.[50]

Because all members of qualified operating unions share in the cost of dispute adjustment by the First Division,

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[48] Kaufman, *op cit.*, p. 47.

[49] *Ibid*, p. 48. Of the "concerted" movements from 1934 and 1950, Kaufman has written: "Although there is a prevailing popular impression that the operating unions tend to act in concert—at least with respect to national movements on wages and working conditions—there are, on the contrary, 'overlapping interests, jealousies, and . . . frequent conflicts' and 'occasionally members of one organization' have acted as strikebreakers in disputes involving a sister organization."

[50] Seidman, *op. cit.*, pp. 14-15; Kaufman, *op. cit.*, p. 47. Not the least of these responsibilities continues to be settlement of crew consist questions on each property, formerly before special boards of adjustment subsidiary to Arbitration Board 282 created by Public Law 88-108 (77 Stat. 132), and now under the normal procedures of the Act, *Brotherhood of Railroad Trainmen v. Akron & Barberton R. R. Co.*, 385 F. 2d 581 (D. C. Cir. 1967); *cert. den.*, 390 US 923 (1968). As Board 282's award recognizes, these crucial matters have never been the subject of national agreement, 41 LA 673, 693 (BNA, Wash. D. C., 1964):

the Second Circuit believes that a literal reading of the proviso is warranted.[51] However, the basic terms of the 1951 amendments negate any legislative concern to authorize union security for the joint benefit of the group of operating unions that support the statutory machinery for minor dispute adjustment. Only unions with collective bargaining rights can make union shop agreements covering operating employees: those that do not participate in the First Division equally with those that do. *Rohrer v. Conemaugh & Black Lick R. R. Co., supra,* 359 F.2d at 131. Were Congress convinced that support of the statutory adjustment procedures was sufficient to warrant alternate membership privileges, it would presumably have granted them to employees and qualified unions in the non-operating crafts as well, since those organizations furnish the same support to labor members of the other Adjustment Board divisions as do the qualified operating unions to the First Division, Sec. 3, First (h). Therefore, the Second Circuit's reading of subparagraph (c) cannot be reconciled with the basic concern of the 1951 amendments.

Nor is that view consistent with the argument premised upon the equitable sharing of representation costs that was "decisive with Congress", *Street,* 367 US at 762. In fact, as the operating unions' dues structure suggests,[52] the cost of an official's time and expenses on the First Division has been but a fragmentary and decreasing portion of the expense of administering labor agreements and settling and adjusting disputes.

Thus, grievances are typically handled first by the local chairman and the superintendent, then if not satis-

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[51] *O'Connell v. Erie Lackawanna, supra,* 391 F. 2d at 163.

[52] Their national dues are "nominal" and go to defray the cost of many other functions besides that of the salary and expenses of the officer serving part time on the First Division. See notes 5 and 10, *supra,* at pp. 6, 7.

factorily adjusted, by the general chairman and the vice-president in charge of industrial relations.[53] From there, unsettled disputes may also be referred either to voluntary special boards or "public law" boards.[54] Since the 1940's, in order "to secure prompt disposition" of these matters, over 400 special boards of adjustment have been created "by agreement usually on an individual railroad, and with a labor organization" to decide "disputes that normally would be sent" to the First Division.[55] Their decisions have "exceeded by several times the output of the First Division", and all of their cost except for that of the referee, is met only by the contracting parties.[56] In 1966, Sec. 3, Second of the Act was amended to provide for special boards, so-called Public Law Boards, "to decide disputes otherwise referable to . . . or . . . pending before the Adjustment Board for twelve months", Public Law 89-456, 80 Stat. 208, 209, June 20, 1966; and the costs of these boards are borne similarly.[57]

The statutory bargaining representative, on the other hand, in addition to its exclusive duty of fair representation, bears all of the expense of collective bargaining within the framework of the more costly mediation, arbitration and Presidential Emergency Board procedures of the Act and, except for the shared cost of the First Division, all of

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[53] "Procedures and Functions of National Railroad Adjustment Board—First Division". *Studies Relating to Railroad Operating Employees, supra,* note 13, p. 199.

[54] The establishment of Special Board of Adjustment No. 140 by respondents is a matter of official record. 22nd Annual Report, p. 49, 29th Annual Report, p. 75.

[55] 33rd Annual Report, p. 63.

[56] "Procedures and Functions of the National Railroad Adjustment Board," *supra,* note 53, p. 219.

[57] The Mediation Board compensates the neutrals. "Each [other] member of the Board shall be compensated by the party he is to represent." Sec. 3, Second as amended.

the expense of contract administration and dispute adjustment as well. Congress modified its previous policy of voluntary unionism as a specific response to these obligations, but members of non-contracting unions share in none of them.

B. The Decision Below Encourages Employees to Avoid Paying for the Cost of Collective Bargaining on Their Behalf by Holding That They Must Be Permitted to Contribute "Nominal" Dues to a Competing Union.

The court below has construed subparagraph (c) as though it were the basic provision of the statute rather than Sec. 2, Eleventh (a). Its decision conflicts with the primary purpose of Sec. 2, Eleventh by holding that qualified unions without statutory responsibilities to their members for the negotiation and administration of their labor agreements and for the adjustment and settlement of their disputes have to benefit from union shop equally with the union that must fulfill them. Correspondingly, it permits operating employees to avoid contributing to their statutory representative, or to any union representing a craft in which they may work, their share of the cost of furnishing these benefits. In short, in conflict with the controlling legislative purpose, it holds that petitioners cannot contract to eliminate free riders.

But even worse, the decision below imputes to Congress a purpose to *encourage* operating employees under union shop agreements to join organizations without collective bargaining responsibilities to them. Congress was aware that the costs of membership in the qualified operating unions vary in amount with the expense of collective bargaining on the property, that the dues are nominal and assessments are levied to meet the costs of negotiating and administering labor agreements. Indeed for this reason, Sec. 2, Eleventh was drafted to permit the col-

lection of assessments as a condition of employment.[58] Since it need not charge assessments that reflect the expense of collective bargaining, an operating union that does not contract on the line may offer employees a less costly membership than their statutory representative must charge.[59]

This Court has already noted the impact of competitive unionism under union shop agreements in such circumstances:

> " 'Employees would be tempted to desert the organization of the bargaining representative which was assuming its responsibilities under the Act in favor of another union which was not . . . and which could thereby offer cheaper dues. This would defeat the very purpose of the [union shop] amendment which is to compel each employee to contribute his part to the bargaining representative's activities on his behalf including its participation in the administrative machinery of the Act.' " *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 955, note 11, *aff'd* 221 F. 2d 736 (6th Cir. 1955), quoted in *Street, supra*, 367 US at 764, note 15.

These considerations led the court in *Pigott, supra,* to reject a literal reading of subparagraph (c) that would have permitted UROC to be selected as an alternate union, and they apply with equal force to a rival, minority union that supports a labor member on the First Division but does not contract with the railroad.

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[58] House Hearings, pp. 71, 257; *Street, supra,* 367 US at 766; note 10, *supra.*

[59] Levinson states: "The inclusion of assessments under the RLA, . . . is of particular moment for the operating unions. Because of the prevailing interunion rivalry, such a union is tempted as a matter of membership recruitment appeal to understate the amount of the membership dues it must levy and then make up the difference by levying membership assessments." "Union Shop Under the Railway Labor Act". *op cit.*, p. 450.

CONCLUSION.

Therefore, subparagraph (c) cannot be read literally without violating the very concerns for which Congress authorized union shop contracts: meeting the problem of "employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union."[60] "[B]elow the surface of the words [in subparagraph (c)] and yet fairly a part of them" is its sole legislative aim to prevent compulsory dual unionism or the shuttling between unions as one shuttles between jobs; and that "immanent" legislative idea[61] must be harmonized with the basic purposes of 1951 amendments, if we are to be "mindful of the manifest purpose of Congress to fashion a coherent national labor policy."[62] A construction of subparagraph (c) to permit contracts, like the one in issue here, that require employees to contribute their share of financial support to a bargaining representative that contracts for a craft in which they may work, effectuates both legislative concerns.

We respectfully request this Court to reverse the judgment below.

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[60] *Labor Board v. General Motors Corp.*, 373 US 734, 743 (1963), quoting *Radio Officers' Union v. Labor Board*, 347 US 17 (1954).

[61] Frankfurter, "Some Reflections on the Reading of Statutes", *supra*, note 28, p. 220.

[62] *Labor Board v. Allis-Chalmers*, *supra*, 388 US at 179-180.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 158.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Petitioners,

vs.

JOHN P. O'CONNELL, *et al.*,

Respondents.

and

No. 172.

ELMER L. DIRKS, *et al.*,

Petitioners,

vs.

W. L. BIRKHOLZ, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

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BRIEF OF AMICUS CURIAE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

INTEREST OF AMICUS CURIAE.

Amicus curiae, Brotherhood of Locomotive Firemen and Enginemen (BLF&E), is a voluntary labor organization having its headquarters in Cleveland, Ohio. It is a railway labor organization "national in scope" and "organized in accordance with" Section 2 of the Railway Labor Act ("RLA"), 45 USC § 152. (See Sec. 3 First (a) RLA, 45 USC § 153 First (a).)

BLF&E has an immediate interest in the subject matter of this litigation. It represents the great bulk of loco-

motive firemen on the nation's major carriers by railroad. In addition, it represents locomotive engineers on several major railroads.

Another voluntary labor organization, likewise "national in scope" and "organized in accordance with" RLA, the Brotherhood of Locomotive Engineers ("BLE"), represents primarily locomotive engineers on carriers by railroad and also represents some firemen. BLE has filed a brief amicus curiae in support of petitioners in each of the cases.

The issue arising between Switchmen's Union of North America (SUNA) and the Brotherhood of Railroad Trainmen (BRT) in the case at bar, arises between BLF&E and BLE. As this Court knows, there is intercraft mobility between firemen and engineers.

The interplay between the crafts of engineers and firemen, the promotion and demotion of engineers and firemen, their dual seniority rights, the ebb and flow or movement from the firemen's craft to the engineers' craft, have been the subject of numerous court decisions. See, for example, *General Committee, BLE v. Missouri-K-T-R.R. Co.*, 320 U.S. 323, 325-6; *Brotherhood of Locomotive Engineers v. Chicago, M., St. P. & P. R. Co.*, 41 F. Supp. 751 (E.D. Wis. 1941); and *Hooser v. Baltimore & Ohio R. Co.*, 177 F. Supp. 186, 194-6 (S.D. Ind. 1959), affirmed, 279 F. 2d 197, 198 (7th Cir. 1960).

On about 296 carriers by railroad of all classes, BLF&E represents the firemen, and BLE the engineers. On 153 carriers, BLF&E represents both firemen and engineers; on 48 carriers, BLE represents both firemen and engineers.

On some carriers, BLE has entered into union shop contracts pursuant to Sec. 2, Eleventh (a), Railway Labor Act, 45 U.S.C. Sec. 152, Eleventh (a). These contracts, on

one or two of the 48 carriers where BLE represents both firemen and engineers, require membership in BLE and no other organization despite the provisions of Sec. 2, Eleventh (c). (See BLE Brief in No. 172, p. 2.)

Litigation essentially similar to the cases at bar has resulted favorably to BLF&E, on the strength of the decision below. (*Carter v. Richmond, F. and P. RR.* (D.C. Va., No. 43987, ____ F. Supp. ____ (Sept. 12, 1968).) (This case is discussed in BLE Brief in No. 172, pp. 2-4.)

BLF&E has entered into union shop contracts on some of the 153 carriers on which it represents both firemen and engineers. The issue involved in this litigation does not arise in connection with BLF&E contracts, however, respecting firemen or engineers who belong to BLE, because BLF&E interprets Sec. 2, Eleventh (c) as permitting alternative membership in BLE to satisfy the union shop requirement.

ARGUMENT.

Sec. 2, Eleventh (c) provides that the requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a), which authorizes the union shop contract, is satisfied as to engine, train, yard, or hostling employees (i.e., operating employees) by membership in any labor organization, national in scope, which admits such employees to membership.

The yard switchmen who belong to respondent SUNA, meet the literal terms of this provision. But petitioners ask this Court to read into Sec. 2, Eleventh (c) a provision not found in the statute. The language they would read in is not wholly clear, but presumably it would permit an employee to join or remain a member of an alternative union provided only such union held a collective bargaining contract with the carrier with respect to

its craft. (Pet. Brief No. 172, p. 4; Pet. Brief No. 158, p. 6.)

Sec. 2, Eleventh (c) provides literally that the union shop membership requirement is satisfied if the employee holds or acquires membership in any one of the labor organizations national in scope. Petitioners would add another qualification.

Petitioners apparently argue that the provisions of Sec. 2, Eleventh (c) should not be read literally. They contend that Sec. 2, Eleventh (c) permits alternative membership when the alternate labor organization is not only national in scope, organized in accordance with the Railway Labor Act, and admits to membership employees in the crafts or classes within the jurisdiction of the First Division of the Adjustment Board (the stated requirements of Sec. 2, Eleventh (c)), but in addition, only when such alternate labor organization is also a duly authorized and designated representative of employees of the carrier involved (a qualification nowhere to be found or even hinted at in Sec. 2, Eleventh (c)).

There are compelling reasons why this Court should decline to so rewrite the statute.

1. The statute is unambiguous; it is therefore inappropriate to consult legislative history.

Petitioners in No. 172 (Pet. Brief pp. 21-33) rely heavily on legislative history.

Research into legislative history is a necessary and valuable adjunct to the interpretative process. But it is a well accepted canon of construction that legislative history is relevant only under circumstances where the statute presents an ambiguity. When the statute is plain, there is no need—indeed, it is inappropriate—to resort to legislative history. *Ex parte Collett*, 337 U.S. 55, is in point.

There the question was whether an action under the Federal Employers' Liability Act was subject to transfer for the convenience of parties and witnesses. Under the literal wording of Sec. 1404 (a) of the Judicial Code, such an action could be transferred, and this Court upheld transfer. It declined to look to legislative history said to carve out an exception from Sec. 1404 (a) for FELA cases, saying:

> "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco, Inc. v. Walling,* 324 U. S. 244, 260. This canon of construction has received consistent adherence in our decisions."

The warning sounded in *Collett* has special relevance here. The Railway Labor Act, while short, is complex legislation, reflecting generations of development of special customs and practices in the railroad industry unlike those prevailing elsewhere. Alternative unions have a place in the railroad industry not accorded them in industry generally. We cite but one example because it is fresh: the Court of Appeals for the Seventh Circuit has held recently that a fireman, a member of BLF&E, in negotiating a grievance arising out of work as an engineer, under a carrier-BLE contract, may be represented by BLF&E. This, despite a provision in the BLE agreement barring such representation. (*McElroy v. Terminal Railroad Association,* 392 F. 2nd 966). (Cert. pending, October Term, 1968, No. 81, filed May 10, 1968). (See BLE Brief No. 172, p. 5).

2. The legislative history supports respondents.

If, however, we do look to legislative history we see that petitioners have misread it. Sec. 2, Eleventh, became an amendment to the Railway Labor Act by enactment of Public Law 914, 81st Congress (S. 3295) approved Jan. 10, 1951. From its inception, S. 3295 recognized the special problem of the operating employees with respect to the union shop. The bill, as originally introduced, dealt with the union shop in cryptic fashion. It authorized the union shop, and provided additionally that an employee could not be discharged "because of membership in any other organization." (The bill in its initial form appears in Hearings on S. 3295, Senate Committee on Labor and Public Welfare, 81st Congress, p. 2.)

At the hearings conducted by the Senate Committee on Labor and Public Welfare, Harry See, a representative of the Brotherhood of Railroad Trainmen, petitioner here in both cases, in May, 1950, suggested to the Senate Committee far more elaborate language. The BRT proposal was that the union shop requirement contain this exception:

> "provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, *which is the duly designated or recognized craft or class representative of any one of them.*" (Emphasis added.) [1]

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[1] Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, p. 69.

There can be little question that the BRT May, 1950, proposal made to the Senate Committee would have permitted the collective bargaining representative to bar an employee from satisfying the union shop requirements by acquiring membership in an alternative union unless the alternative union was also a duly authorized and designated representative of employees of the carrier involved.

The BRT proposal was not adopted. S. 3295 as it emerged from the Committee contained no provision regarding the operating unions separately. (Rept. 2262, 81st Congr. 2nd Sess. August 9, 1950 Senate Committee on Labor and Public Welfare p. 1.) When the bill reached the floor of the Senate, on September 23, 1950, the Committee offered an amendment to restore essentially the original proviso. (96 Congr. Rec. 15735.) But the BLE objected.

When the bill reached passage stage on December 6 the matter still was unresolved. Senator Lucas of Illinois asked for a recess, 96 Congr. Rec. 16189. That very day, December 6, BRT, BLF&E, and Order of Railway Conductors transmitted the text of Section 2, Eleventh (c) as it became law. They urged adoption of S. 3295 with the modification suggested. The Senate, the next day, December 7, adopted the proposed language. (96 Congr. Rec. 16268.)

The conclusion is inescapable that BRT was fully aware of the problem at bar; that it proposed language to authorize the agreements now at bar; that such language never found its way into a committee proposal or an amendment on the floor of Congress; that BRT and the other organizations seven months later proposed language to Congress varying critically from the initial proposal and that Congress adopted it. We do not know what prompted BRT and the other organizations to recommended language to Congress varying from the May, 1950,

BRT proposal. What we do know is that the proposal transmitted to Congress on December 6 did not contain the restrictive limitation initially proposed by BRT.[1]

BRT seeks to obtain by litigation what it had ceased even to ask for from Congress.[2]

3. The Rychlik and Rohrer cases do not help petitioners.

Petitioners (Pet. Brief No. 172, pp. 14-19; No. 158, p. 6) rely heavily on *Pennsylvania R. Company v. Rychlik*, 325 U. S. 480, wherein this Court considered the meaning of the phrase in Sec. 2, Eleventh (c)—"labor organizations, national in scope, organized in accordance with this Act." Membership in such organizations is permitted as an alternative to joining the union holding the contract. In *Rychlik*, this Court held that the phrase refers only to unions represented on the National Railroad Adjustment Board. A union even if "national in scope" is not "organized in accordance with" the Act, if it lacks such representation. No other issue was decided.[3]

Rohrer v. Conemaugh and Black Lick Railroad Company, 359 F. 2d 127 (3rd Cir. 1966), like *Rychlik*, is cited

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[1] BLE Brief No. 172 p. 21 et seq. refers to the BRT proposal but does not quote the text actually suggested. Thus the crucial point of the above analysis is not apparent.

[2] The issue before this Court affects primarily the operating employees and their brotherhoods. Congress wished to let them solve their own problems in their own way. What this Court once said of the RLA is surely true of the 1951 RLA amendments:

> "It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement." *Railway Employees Department v. Hanson*, 351 U.S. 225, 240 (concurring opinion of Mr. Justice Frankfurter).

[3] This Court did consider the legislative history of the 1951 amendment, but did not discuss the critical BRT proposal, and its subsequent rejection.

by both petitioners (Pet. Brief No. 172, p. 19; No. 158, p. 6). *Rohrer* holds only that a union may enter into a valid union shop agreement under Sec. 2, Eleventh (a) although not "national in scope" and not "organized under" the Railway Labor Act. (The union was the Steelworkers). The exceptions of Sec. 2, Eleventh (c) were not before the Court. *Rohrer* accordingly does not advance petitioners' cause.

4. Contemporaneous construction of the statute and past practice in the industry favor respondents.

From 1951, when the union shop provision was first enacted, until about 1967, it was the uniform practice of the operating brotherhoods to frame their union shop clauses couched in the language of Sec. 2, Eleventh (c). This fact constitutes persuasive evidence that Sec. 2, Eleventh (c), when first enacted and for many years thereafter was interpreted by all of the operating brotherhoods, including petitioners, to mean what respondents say it means. Not until about 1967, for the first time, did BRT apparently attempt to read into it the meaning it now claims. It is an established principle of law that a court will not reject "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." This language from *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, was applied to an administrative agency. But it has, we think, equal force here where the men "charged with the responsibility" are the brotherhoods to whom the statute was a grant of authority coupled with a restriction on the grant. Their contemporaneous and continuing interpretation of the restriction should be given weight. This consideration

has special weight, where, as here, petitioners seek to read into the restriction words which are not there.

CONCLUSION.

The judgments below are supported by the clear language of the statute; it is therefore inappropriate to consult legislative history; if such history is consulted it does not aid petitioners. Contemporaneous construction of the statute and continued practice both are opposed to the position of petitioners.

The judgments should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,
Petitioners,

vs.

JOHN P. O'CONNELL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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IN THE

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OCTOBER TERM, 1968.

No. 158.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

vs.

JOHN P. O'CONNELL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED.

Whether Section 2, Eleventh (c) of the Railway Labor Act, 45 U. S. C. 152, Eleventh (c), should be construed literally so that full effect is given to its clear and unambiguous language providing that membership of an operating employee in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership operating employees, satisfies the membership requirements of any collective bargaining agreement applicable to operating employees, without implying that the satisfying membership is limited to a labor organization which holds a contract for a craft or class in which the employee has an expectation of employment.

STATEMENT.

Nature of the Case.

This is a suit for injunction, declaratory judgment and damages filed by three yard service employees and four conductors of the Erie Lackawanna Railroad Company who sued on behalf of themselves and all other members of the Switchmen's Union of North America, AFL-CIO and of the Order of Railway Conductors and Brakemen, who are employed by that railroad. The complaint alleged that the railroad had entered into union shop contracts which violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act, as amended, 45 U. S. C. 152 (R. 48a-58a). Federal jurisdiction was invoked under United States Code, Title 28, Section 1337, conferring jurisdiction on federal district courts of any civil action or proceeding arising under any act of Congress regulating commerce and under Section 2201 of the Federal Declaratory Judgment Act, 28 U. S. C. 2201.

The Parties.

This suit as originally filed in the district court had as parties plaintiff the Switchmen's Union of North America, AFL-CIO, and three yard service employees of the Erie Lackawanna Railroad Company who sued on behalf of themselves and on behalf of all members of the Switchmen's Union of North America, AFL-CIO, who are employed by the Erie Lackawanna Railroad Company (R. 48a-50a). The complaint alleged as follows: More than 500 members of the Switchmen's Union are employed by the Erie Lackawanna (R. 30a, 50a) and hence constitute a class so numerous as to make it impossible to bring them

before the court in person (R. 50a). The three individuals have been employed by the defendant Erie Railroad or its predecessor for respectively 25 years, 31 years and 19 years and have been members of the Switchmen's Union for respectively 15 years, 29 years and 15 years (R. 49a-50a). Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their continued membership in the Switchmen's Union (R. 54a-55a). The constitution of the Trainmen's Union would not permit membership in the Trainmen's Union and the Switchmen's Union at the same time (R. 54a). Hence if plaintiffs and other members of the class they represent are required to become members of the Trainmen's Union they will lose valuable insurance rights (R. 54a-55a).

After Judge Herlands had entered the preliminary injunction in the district court, the Order of Railway Conductors and Brakemen and four of its members suing on behalf of themselves and on behalf of all other more than 225 members of the Order of Railway Conductors employed by the Erie Lackawanna applied for leave to intervene on the ground that they were in exactly the same situation as the original plaintiffs. The individual intervenor-plaintiffs have periods of employment on Erie Lackawanna ranging from 23 to 25 years and of membership in the Order of Railway Conductors ranging from four to thirteen years. The individual intervenor-plaintiffs and members of their class also hold valuable insurance rights which will be lost if they are required to cease being members of the Conductors and become members of the Trainmen's Union since the constitution of the Trainmen's Union bars membership in both the Conductors and the Trainmen. Judge Murphy granted the motion to intervene. By stipulation entered into in the Chambers of Judge Wyatt, the parties agreed that the preliminary injunction in favor of the original

plaintiffs would have like applicability to the intervenors-plaintiffs (R. 26a, 170a).[1]

The defendants named both in the original complaint filed by the Switchmen's Union and its members and the complaint filed after the Order of Railway Conductors and its members were permitted to intervene as intervenors-plaintiffs, are the Erie Lackawanna Railroad Company, the Brotherhood of Railroad Trainmen, the Vice President of the Trainmen's Union and the General Chairman of the Trainmen's Union sued in both their individual and representative capacity on behalf of all members of the Trainmen's Union (R. 51a).

History of Status of Switchmen's Union and Conductors Union on the Erie Lackawanna Railroad.

For many years prior to the merger of the Delaware, Lackawanna & Western R. R. Co. and the Erie Railroad in October, 1960, the Switchmen's Union had been the duly designated and recognized representative of the craft or class of yard foremen, helpers and switchtenders employed by the Delaware, Lackawanna & Western R. R. Co., while the Brotherhood of Railroad Trainmen represented these crafts and classes on the Erie Railroad (R. 30a, 51a).

Following the enactment of the Union Shop Amendment to the Railway Labor Act in January of 1951, and at all times thereafter until the merger of the two roads, each the Switchmen's Union's contract with the Delaware Lackawanna & Western R. R. Co. and the Brotherhood of Railroad Trainmen's contract with the Erie Railroad contained union shop provisions which conformed in all respects to

1. While the petitioners have not seen fit to print any of the documents pertaining to the intervention, they establish that the position of the intervenors-plaintiffs is in all respects identical to that of the original plaintiffs, as the district court found (R. 27a).

the provisions of Section 2, Eleventh of the Railway Labor Act as amended (45 U. S. C. 152, Eleventh) and contained the express provision that membership in any one of the labor organizations national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board should satisfy the requirements for membership of the union shop provisions (R. 30a, 51a-52a). The union shop provisions of the Brotherhood of Railroad Trainmen's contract was at all times construed and applied so that membership in either the Switchmen's Union or in the Order of Railway Conductors satisfied the requirement for membership (R. 51a-52a). During this period more than 500 yard service employees maintained membership in the Switchmen's Union without joining the Trainmen (R. 30a) and since then 225 conductors and trainmen maintained membership in the Order of Railway Conductors without joining the Trainmen. The union shop provisions of the Switchmen's Union's contract was at all times construed and applied so that membership in the Brotherhood of Railroad Trainmen satisfied the requirement for membership (R. 52a).

Following the merger of the two railroads the National Mediation Board conducted an election among all the yard service employees of the merged railroads which was won by the Brotherhood of Railroad Trainmen receiving 43 votes more than the Switchmen's Union out of a total of 1943 votes cast by eligible voters in the craft or class of yard service employees (R. 52a). The Brotherhood of Railroad Trainmen and the Erie Lackawanna Railroad Company from 1960 until March 14, 1967 construed and applied the union shop provisions of the Trainmen's contract with the railroad as satisfied by membership in either the Switchmen's Union or in the Order of Railway Conductors and

more than 500 employees of the railroad employed in the craft or class of yard foremen, helper and switchtender continued at all times to be members of the Switchmen's Union and did not join or maintain membership in the Brotherhood of Railroad Trainmen (R. 52a-53a). Similarly more than 225 employees of the railroad employed in the craft or class of conductor and brakeman continued at all times to be members of the Order of Railway Conductors and did not join or maintain membership in the Brotherhood of Railroad Trainmen.

The Illegal Union Shop Contracts.

On March 14, 1967 the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen entered into a collective bargaining agreement effective immediately which provided (R. 59a):

> "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N. J., Newark, N. J. and Dundee, N. J., Port Jervis, N. Y., Middletown, N. Y., Newburg, N. Y., Syracuse, N. Y., Utica, N. Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: . . ."

On April 4, 1967 the Erie Lackawanna Railroad Company and the Brotherhood of Railroad Trainmen entered into a similar union shop agreement which required all conductors, ticket collectors, baggagemen and trainmen employed by the Erie Lackawanna Railroad Company, former Erie District, to become and remain members of the

Brotherhood of Railroad Trainmen as a condition of continued employment (R. 20a, 168a-169a).

Neither of these agreements contains the provisions set forth in Section 2, Eleventh (c) of the Railway Labor Act which require that membership in any other union national in scope organized in accordance with the Railway Labor Act which admits employees in yard service to membership shall satisfy the requirement of membership in a labor organization which has a union shop agreement. The Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company have threatened to discharge John P. O'Connell, R. A. Gallo and Charles Doyle and all the other members of the Switchmen's Union and the individual intervenors-plaintiffs and other members of the Conductors who are employed by the railroad unless they cease to be members of the Switchmen's Union and the Order of Railway Conductors and become and remain members of the Brotherhood of Railroad Trainmen (R. 55a).

The constitution of the Brotherhood of Railroad Trainmen, by Section 132 thereof (R. 65a), does not permit the plaintiffs or intervenors-plaintiffs or any other members of the Switchmen's Union or of the Order of Railway Conductors to become and remain members of the Brotherhood of Railroad Trainmen because each the Switchmen's Union and the Order of Railway Conductors is actively engaged in seeking to gain representation rights for employees employed by the Erie Lackawanna Railroad Company and now represented by the Brotherhood of Railroad Trainmen (R. 31a-32a, 54a).

Each the Switchmen's Union and the Order of Railway Conductors has at all times been a labor organization national in scope, organized in accordance with the provisions of Section 2 of the Railway Labor Act, as amended (45 U. S. C. 152) and as such has continuously since adop-

tion of the 1934 amendments to the Railway Labor Act (48 Stat. 926), participated in the selection and designation of the labor members of the National Railroad Adjustment Board (R. 25a, 40a).

Opinions and Judgment Below.

The main opinion in the district court is that of Judge Herlands granting the plaintiffs' motion for a preliminary injunction (R. 29a-47a). Judge Herlands held that the union shop agreements here involved violated the Railway Labor Act because they failed to contain a provision permitting membership in any one of the unions national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board, to satisfy the membership requirements of the contracts as required by the literal language of Section 2, Eleventh (c) of the Railway Labor Act as amended (R. 34a-47a). Judge Herlands, in a scholarly and completely annotated opinion (R. 29a-46a), reviewed the legislative history of the union shop amendment to the Railway Labor Act and pointed out that Congress rejected an amendment proposed by the Brotherhood of Railroad Trainmen which was worded in the manner which would sustain the validity of the union shop contracts here involved (R. 36a-44a). Instead, Congress adopted a carefully worded amendment which had been drafted by the unions themselves and which preserved under union shop conditions the pre-existing practice among operating unions "of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union" (R. 41a).

Judge Palmieri in granting the motion for summary judgment for plaintiffs and intervenors-plaintiffs adopted Judge Herlands' opinion (R. 24a-28a).

The judgment entered declared that the union shop agreements of March 14, 1967 and April 4, 1967 violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act (45 U. S. C. 152, Third, Fourth, Fifth, and Eleventh) and included a permanent injunction enjoining and restraining the Erie Railroad from discharging or threatening to discharge, and enjoining and restraining the defendant Trainmen from causing or attempting to cause the discharge of, any employee of the Erie Lackawanna Railroad Company for failure to join or maintain membership in the Brotherhood of Railroad Trainmen so long as he maintains membership in the Switchmen's Union of North America or in the Order of Railway Conductors (R. 20a-22a).

On appeal, the United States Court of Appeals for the Second Circuit affirmed (R. 19a). Its opinion contains a careful analysis of the legislative history of the provisions of Subsection (c) of Section 2, Eleventh (R. 9a-15a). As a result the Court stated (R. 7a):

> "We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant [Brotherhood of Railroad Trainmen] contends."

The Second Circuit concluded (R. 9a):

> "We believe that the legislative history of the section shows that it was meant to permit membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board to satisfy the union shop requirement of a contract pursuant to Section 2, Eleventh of the Railway Labor Act."

The Second Circuit rejected the contention that *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480 (1957) required a holding that the alternate permissible membership was confined to a union holding a contract for a craft or class which the employee could expect, in the course of normal ebb and flow between crafts, to flow to or from (R. 15a-17a). Referring to the dictum in *Rychlik* that the only purpose of subparagraph (c) was to meet the problem of dual unionism in intercraft mobility, the Second Circuit observed that intercraft mobility presents two aspects, only one of which was adverted to in *Rychlik* (R. 16a). The other aspect, which gives meaning to a literal reading of subparagraph (c) arises when the ebb or flow results in a change in the majority union. The Second Circuit pointed out that during the sixteen year period immediately preceding the enactment of subparagraph (c) "there were 544 instances on 64 different railroads in which, through demotions or promotions due to changed employment conditions or through union recruiting, a minority union in a craft achieved a majority and as a result took over the contract traditionally held by another union" (R. 17a). Thus the unions were accustomed to the existence of enclaves of minority union representation which the unions wished to perpetuate under union shop conditions. Subparagraph (c) was drafted to preserve this historic practice (R. 17a).

The contention that a literal reading of subparagraph (c) conflicts with the purpose to prevent "free riders", was answered by the Second Circuit as follows (R. 18a-19a):

> "But we cannot say that the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose. It is quite conceivable that Congress intended to implement its scheme through a system of reciprocal gains and losses among the various operating unions. While the Brotherhood of

Railroad Trainmen does not collect dues from some of the employees of the Erie Lackawanna whom it represents, concededly it collects dues from employees of other railroads who are represented by other operating unions."

SUMMARY OF ARGUMENT.

I. The literal language of Section 2, Eleventh (c) of the Railway Labor Act is clear and unambiguous. All parties concede that if the language is read literally or given its natural meaning the union shop agreement here before the Court is invalid.

A. Section 2, Third of the Railway Labor Act prohibits union shop agreements which do not permit membership in any of the unions national in scope to satisfy the membership requirement in lieu of membership in the contracting union. The three separate provisions of Subparagraph c of Section Eleven state the extent to which a union shop agreement is legal. First, it states that membership requirements in any union shop applicable to operating employees shall be satisfied by membership in any of the standard operating unions. Second, it states that any employee who is not a member of one of these unions when a union shop goes into effect may be required to join the contracting union. Third, it states that nothing in the statute shall prevent any operating employee from changing his membership between the various operating unions. As this Court pointed out in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959), subparagraph (c) establishes "the area that the Act leaves open for solicitation by rival organizations" and provides "the area where even a worker under a union shop arrangement can change affiliations."

B. The legislative history establishes that Congress rejected proposals which expressly delimited the right to alternative membership as set forth in the agreement held invalid by the courts below. Rather than so limit the ex-

ceptions to a strict union shop the labor committees of both the Senate and the House reported an amendment which would have permitted membership in any union to satisfy any union shop agreement applicable to railroad employees. The operating unions opposed this amendment and themselves drafted as a substitute for each of the prior proposals the language of Section 2, Eleventh (c) which permits instead of membership in any union, only membership in a standard operating union, to satisfy the membership requirements of a union shop agreement applicable to operating employees. Congressmen on the floor of Congress in debate preceding adoption made it clear they understood the bill they were passing gave operating employees full freedom to choose which of the five operating brotherhoods they wished to join and in which to maintain membership.

C. For fifteen years following its enactment all railway unions and all railroads, courts and administrative agencies construed and applied the union shop amendment to the Railway Labor Act to permit of no restriction on the right of any operating employee to choose in which of the five operating unions he desired to maintain membership. This contemporaneous construction followed by the unions which drafted the language of Section 2, Eleventh (c) establishes it was intended to be read literally. It cannot be assumed the draftsmen misunderstood their draft.

D. Membership in any one of the five standard operating unions contributes to the financial support of the collective bargaining apparatus applicable to operating employees approximately equally as much as membership in any other. The five unions act jointly not only in the resolution of grievances through the National Railroad Adjustment Board but in major nationwide movements for wage increases and fringe benefits. Both before and after the adoption of the union shop amendment, collective bargaining on the railroads with respect to operating employees

was conducted on a national basis with all five operating unions sharing the costs. Membership in any one served the purpose of eliminating the "free rider".

E. The Trainmen's present construction of Section 2, Eleventh (c) reads the last proviso out of the statute. If the only purpose was to prevent an employee who ebbed and flowed between crafts from being required to change his membership to meet the union shop requirements of each craft, Congress would never have provided that nothing in any agreement shall prevent an employee from changing his membership from one operating union to another. This proviso manifests the Congressional intent to preserve full freedom to operating employees to move freely from one operating union to another without any restrictions from any union shop agreement.

F. Nothing in *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480 (1957) or *Rohrer* v. *Conemaugh & Black Lick Railroad Co.*, 359 F. 2d 127 (3rd Cir. 1967) constitutes a precedent for construing Section 2, Eleventh (c) as permitting a union shop agreement to require an operating employee to belong to one of the standard operating unions rather than another. In neither case was this issue before the Court. Every case which has presented this issue has been decided in favor of a literal reading of Section 2, Eleventh (c).

II. A construction of Section 2, Eleventh (c) which permits union shop agreements to restrict employees to membership in either the contracting union or some other union having a contract for a craft or class related to their craft or class, makes Section 2, Eleventh (c) meaningless. If employers are uncertain as to the right to an alternate membership, the fear of loss of employment will force them to join the contracting union. The absence of any clear cut definition of the available alternate membership means there will be no alternate membership, as a practical matter.

ARGUMENT.

I.

THE RAILWAY LABOR ACT PROSCRIBES AS ILLEGAL ANY UNION SHOP AGREEMENT APPLICABLE TO OPERATING EMPLOYEES WHICH DOES NOT PERMIT SATISFACTION OF THE MEMBERSHIP REQUIREMENT BY MEMBERSHIP IN ANY ONE OF THE UNIONS, NATIONAL IN SCOPE REPRESENTING OPERATING EMPLOYEES.

In both of the courts below the Brotherhood of Railroad Trainmen conceded that it can only prevail if the courts reject a literal reading of subparagraph (c) of Section 2, Eleventh. In the district court, as the opinion of Judge Herlands pointed out (R. 34a), the Brotherhood of Railroad Trainmen "frankly conceded upon oral argument—as it was obviously compelled to do—that the union shop clause of the new collective bargaining agreement would violate Section 2, Eleventh (c) of the Railway Labor Act if the latter were construed literally." In the Second Circuit the concession of the Brotherhood of Railroad Trainmen in that Court was stated in the opinion of the Court as a concession "that if the words of Section 2, Eleventh of the Railway Labor Act are given their natural meaning, the agreement is invalid" (R. 6a).

In this Court the Brotherhood of Railroad Trainmen makes no effort to support its position by the language of the statute but instead makes the type of a policy argument which should be directed to Congress rather than to this Court. Even this argument of the Brotherhood of Railroad Trainmen rests in large part on assumptions of fact neither supported by the record in this case nor judicially noticeable. See for instance the statement (Pet. Br., p. 8)

that one of the "disadvantages flowing" from the interpretation adopted by the courts below is that "The union dues of most employees must be higher to compensate for the loss of dues paid to outside unions." But as the Second Circuit pointed out in its opinion in this case, all five unions in which alternate membership is sanctioned, "jointly share the cost of administering the machinery of the National Railway Labor Act" (R. 18a) and to the extent that "the Brotherhood of Railroad Trainmen does not collect dues from some of the employees of the Erie-Lackawanna whom it represents, concededly it collects dues from employees of other railroads who are represented by other operating unions" thus creating "a system of reciprocal gains and losses among the various operating unions" (R. 18a).

Before answering the other inaccuracies in the brief of the Brotherhood of Railroad Trainmen, we shall first show that the language used by Congress is completely precise and accords fully with the Congressional intent.

A. Section 2, Third of the Railway Labor Act Prohibits All Union Shop Contracts Which Do Not Permit Satisfaction of the Membership Requirement for Any Operating Employee by Membership in Any One of the Unions, National in Scope, Representing Operating Employees as Required by Section 2, Eleventh (c).

As each Judge Herlands (R. 34a), Judge Palmieri (R. 27a) the Second Circuit in this case (R. 9a), the Seventh Circuit in the *Dirks* case, 391 F. 2d at p. 290, held, the literal language of Section 2, Eleventh (c) of the Railway Labor Act is violated by any contract requiring membership in the contracting union which does not permit satisfaction of the membership requirement by membership in any one of the unions, national in scope, representing operating employees.

Prior to 1951 the Railway Labor Act made all union shop agreements illegal. This was accomplished by the absolute prohibition upon employer interference with, influence or coercion of employees in the choice of their representatives which was set forth in Section 2, Third of the Railway Labor Act (45 U. S. C. 152, Third). This section reads:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in any manner to prevent the designation of its employees as their representatives of those who or which are not employees of the carrier."

In 1951 Congress made an exception to the foregoing section to permit a limited form of union security. Congress retained Section 2, Third as above quoted without change but added subdivision Eleventh to Section 2. For the purposes of this case the pertinent statutory provisions are subsections (a) and (c) of Section 2, Eleventh (a) and (c), which read as follows (45 U. S. C. 152, Eleventh):

> "Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days, following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *
>
> * * * * * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employees, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. *Provided, further,* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

There could hardly be a clearer statement that the only instance in which a union representing yard service employees can require an employee to join that union, as opposed to one of the other unions national in scope representing operating employees, is when that employee is not a member of any such union, on the effective date of the agreement, he may be required to join the contracting union. This is explicitly provided by the next to the last proviso clause in Section 2, Eleventh (c). And

even such an employee, as well as any other employee, may thereafter change his membership to any of the other unions national in scope and admitting to membership operating employees, without thereby putting himself out of compliance with the membership requirements of a valid union shop agreement. This is expressly provided in the last proviso to Section 2, Eleventh (c). This Court in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959) relied upon this proviso as establishing "the area that the Act leaves open for solicitation by rival organizations" and provides "the area where even a worker under a union-shop arrangement can change affiliations, see *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 492-494."

In the *Felter* case, this Court (359 U. S. at p. 337) held the Congressional policy permitted "Organizational efforts * * * attended by persuading the recruit to drop his membership in his present union (which in the *Felter* case was the Trainmen's Union holding the union shop contract applicable to the craft within which Felter was employed (359 U. S. at p. 336) and terminate any check-off of his wages in its favor." This Court therefore held illegal and violative of the Railway Labor Act a contractual arrangement between the Trainmen's Union and the Southern Pacific which required the use of a prescribed form supplied to all employees, if the employee wished to revoke his check-off, stating (359 U. S. at 337-338): "There may well be a difference in the weight of persuasion necessary to enlist the worker if he cannot at once effectuate his intentions through papers furnished him on the spot by the recruiting organization. We do not say whether the 'cooling off' period which the procedure insisted upon here creates would be wise or unwise as a matter of policy. It is enough to say that we believe the Act has not left any place for it."

The line of reasoning followed by this Court in the *Felter*

case makes it completely unreasonable to read into Section 2, Eleventh (c) other limitations narrowing the membership permitted by Section 2, Eleventh (c). The union shop agreement between the defendant Trainmen's Union and the railway violate the express language of Section 2 Eleventh (c) by not permitting membership in another union national in scope and admitting yard service employees to satisfy the membership requirement. The Trainmen's Union and the railway by refusing to allow membership in another union national in scope and admitting operating employees to satisfy the membership requirement of their contract have violated the Railway Labor Act.

The Petitioner's Brief in this case in this Court does not mention the *Felter* case. However, the Brief of Brotherhood of Locomotive Engineers as *amicus curiae,* pp. 5-6, asserts that the Second Circuit was in error when it stated that "the Supreme Court's decision in *Felter* v. *Southern Pacific Co.,* 359 U. S. 326 (1959) implies that an employee can satisfy the union shop requirement by membership in any of the recognized railroad unions for the First Division, since the Court assumed that Felter had validly changed his union membership although it was clear that he left the union which was his bargaining agent" (R. 18a). The Engineers as *amicus curiae* assert that Felter was employed as a conductor, was represented by the Order of Railway Conductors and hence was really leaving a union which was not his representative to join the union which was his representative (Br. BLE, p. 5). Admittedly *amicus curiae* does not find these facts in either this Court's opinion in the *Felter* case or the record in that case. Rather *amicus curiae* have consulted the Annual Reports of the National Mediation Board to learn that in 1956 the Order of Railway Conductors and Brakemen was the representative of conductors on the Southern

Pacific (Br. BLE, p. 6, n. 1). Whatever the true state of Felter's employment may have been, this Court recited in its opinion that Felter was "represented" by the Trainmen "in the negotiation of the bargaining agreement" (359 U. S. at p. 336) and decided the case on that basis. Moreover the Trainmen would have been powerless to make any check-off agreement applicable to Felter unless the Trainmen was the exclusive bargaining representative for the craft in which Felter was employed. Minority unions have no power to enter into any check-off arrangements. *Switchmen's Union* v. *Southern Pacific Co.*, 253 F. 2d 81, 84-85 (9th Cir. 1958), certiorari denied, 358 U. S. 818 (1958).

Accordingly we submit that this Court in the *Felter* case accepted the literal language of Section 2, Eleventh (c) and construed that section as permitting membership in any one of the operating unions to satisfy membership requirements in a union security agreement entered into by any other operating union.

B. Congress Rejected Proposals to Permit Unions Representing Operating Employees to Make Union Shop Agreements Requiring Membership in the Contracting Union and Instead Made Such Agreements Legal Only When They Permitted Membership in Any Standard Operating Union to Satisfy the Membership Requirement.

The legislative history of Section 2, Eleventh (c) compels the conclusion that a literal application of its terms was intended. The literal language conforms in every respect to the solution devised by the railway labor organizations for the particular relationship which existed between the standard railway labor organizations which represented operating employees.

The 1934 amendments to the Railway Labor Act which prohibited all forms of union shop agreements in the railroad industry had been agreed to by railway labor as a means of getting rid of company unions. George M. Harrison, appearing as spokesman for the Railway Labor Executives Association, before the congressional committees which considered the union shop amendment in 1950, reviewed the history of union shops on the railroads as follows.[2]

> "On many roads company unions operated under closed shop conditions requiring membership in a 'system association' or employee representation plan as a condition of employment * * *
>
> "It was this carrier influence over self-organization, that was the principal target of the 1934 amendments. * * *
>
> "In the then existing atmosphere, we were forced to agree to some statutory prohibition against the continuation of the type of union shop which already existed under the coercive control of company unions by management. We were not in a position to bargain for the union shop at that time, but even then we tried to restrict the statutory prohibition against requiring an employee to join a union to 'company unions' ".

Testifying before the Senate Committee Mr. Harrison stated:[3]

> "* * * when the Railway Labor Act was amended in 1934 the prohibition now appearing in the law was put in. We opposed the prohibition at that time. I happened to represent all the unions at that time before the Senate and House committees. We tried to keep it out of the bill but we did not succeed."

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2. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2d Sess., on H. R. 7789 (May 9, 1950), p. 8.

3. Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2d Sess., on S. 3295 (May 1, 1950), p. 7.

Senate bill 3295, 81st Cong., 2d Sess., and its companion bill in the House, H. R. 7789, 81st Cong., 2d Sess., as originally introduced in Congress permitted labor organizations and carriers to enter into the usual type of union shop agreements, that is, one which required all employees within the craft or class to join the contracting labor organization. It contained only the one limitation that the contracting labor organization must not deny any employee membership or expel him because of membership in any other labor organization. This appeared in the last clause of the proviso to subparagraph (a) of Paragraph Eleventh which was to be added to Section 2 of the Railway Labor Act, S. 3295, 81st Cong., 2d Sess., First Senate print. There was no difference, in the bill as originally drafted and introduced, between the type of union shop agreements which was applicable to operating employees and that applicable to non-operating employees. This bill was sponsored by the Railway Labor Executives Association which at that time had as affiliates 21 standard railway labor organizations. Three of the standard operating unions, namely, the Switchmen's Union, the Order of Railway Conductors, and the Brotherhood of Locomotive Firemen and Enginemen, were included among the 21 affiliates.[4] The Trainmen's Union and the Brotherhood of Locomotive Engineers were not at that time affiliates.

George M. Harrison, as the representative of the Railway Labor Executives' Association, appearing before both the Senate and House Committees considering this bill, testified that the reason for the provision forbidding any labor organization to require membership of any employee as a condition of employment unless it permitted that employee also to belong to any other labor organization was to conform to the existing practice of employees in the operating crafts of retaining membership in the labor organi-

4. *Ibid.*, p. 2.

zation representing the craft or class in which they had been largely employed even after promotions for longer or shorter periods to a higher craft or class or demotions for longer or shorter periods to a lower craft or class. He testified (Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2d Sess. on S. 3295, pp. 18-19):

> "The phrase on lines 14 and 15 on page 2 of the bill may require some explanation. I refer to the clause 'because of membership in any other labor organization.'
>
> "The collective-bargaining units for which provision is made in the Railway Labor Act are designated as crafts or classes. These crafts or classes, with the exception of occasional fringe employees, have a well understood and generally recognized scope. They are for the most part uniform as to scope on every carrier subject to the Railway Labor Act. Unlike most collective-bargaining representatives in outside industry, there are those in the railroad industry which recognize and protect the rights of employees who, because of the nature of their work, move back and forth across craft or class lines, and consequently move from the rules and working conditions of one collective-bargaining agreement to another. Good examples are those employees in the firemen's craft or class and those in the engineers' craft or class. The ordinary line of promotion for a fireman is to the position of engineer, and in a reduction of forces the engineer returns to a fireman's position. These two crafts or classes usually are represented by different organizations. Conceivably, either the firemen's or engineers' organizations, or any other organization concerned with the movement of employees back and forth from one craft or class to another, could deny membership to employees who are members of another labor organization, and under a union-shop agreement endeavor to compel a carrier to discharge an employee whom the union would not accept because of his membership in another union.
>
> "While we believe the preceding phrase would pro-

> hibit an agreement of that kind, it was deemed advisable to make this restriction absolutely clear so that employment could not be denied because a union refused to accept an employee into membership because he belonged to another union. That is the purpose of the phrase on lines 14 and 15 of page 2."

His testimony before the House Committee in this respect was almost identical. Hearings before the Committee on Interstate and Foreign Commerce, House, 81st Cong., 2d Sess. on H. R. 7789, p. 13.

The ebb and flow between trainmen, baggagemen and conductors and between yard service and road service is similar to the ebb and flow between firemen and engineers which is the illustration which Mr. Harrison used in his above quoted testimony. Harry See, appearing before both the Senate and House Committees as the representative of the Trainmen's Union, testified to the ebb and flow between road and yard service as follows (Hearings before Senate Committee, *op. cit.*, p. 68; Hearings before House Committee, *op. cit.*, p. 31):

> "This shuttling back and forth of employees from one craft to another is by no means limited to road brakemen and road conductors. On some carrier properties road and yard rights may be jointly held by the same individuals. There the shuttling back and forth among these crafts, namely the crafts of yardmen, road brakemen and road conductors, will be clearly demonstrated."

The Trainmen's Union traditionally represents road service while the Switchmen's Union represents yard service. The same employee may hold seniority in both road and yard service and exercise one or the other right depending on the level of employment.[5] Mr. Harrison could have

5. See Report of President's Railroad Commission established by Executive Order No. 10891, issued February 28, 1962, p. 324, "The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during

used this illustration of ebb and flow equally as well as the illustration between fireman and engineer which he did use.

The bill as introduced in the Senate and the House was opposed by all the operating unions as it would have upset the practice of employees in the operating crafts to permit members of any one of the operating crafts to continue to belong to that union even when working under the contract of another operating union. The railroads who opposed the bill because of their opposition to the union shop, also mentioned that the bill as introduced would have this effect. Thus Daniel P. Loomis, Chairman of the Association of Western Railways, appearing on behalf of the Association of American Railroads, testified (Hearings before House Committee, *op. cit.*, p. 72):

> "You have a situation on representation that, on some properties and in some crafts is very close. For example, one of the railroads * * * according to the records of the last election held, they would indicate that about 55 percent of the yardmen on that railroad belonged to the switchmen's union and the other 45 percent belonged to the Brotherhood of Railroad Trainmen. That contract happens to have changed hands I think twice in recent years.
>
> "With a union shop, I take it that the 45 percent that belonged to the Brotherhood of Railroad Trainmen, and who hope to reestablish the majority that they held 3 or 4 years ago, would all be required to join the switchmen's union and be subject to the discipline of the switchmen's union organization."

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the same tour of duty) is in effect on a number of railroads. Many thousands of employees hold these rights." The National Mediation Board has often had occasion to note such dual seniority rights when it ruled that whether such an employee should vote in the yard craft or the road craft should be determined on the basis of which one he spent the preponderant amount of his time in during the year preceding the election. See for example, *Pittburgh & Lake Erie R. R. Co.*, 1 NMB 115, 124 (1938); *Akron, Canton & Youngstown Railway*, 1 NMB 126, 127-129 (1938).

We have set out in Appendix A at the end of this brief a list of all the instances in which from the enactment of the 1934 Amendments to the Railway Labor Act until the 1951 union shop amendment, a minority enclave became so large as to be able to take over the contract for a craft which it traditionally did not represent. For instance, in 1934 and 1935 the Brotherhood of Locomotive Engineers held the representation rights of firemen on five roads and in no instance did the Brotherhood of Locomotive Firemen hold bargaining rights for engineers. These were years of low employment and hence so many engineers were working as firemen as to constitute a majority of the firemen. Then in World War II years with employment greatly increased we find the Brotherhood of Locomotive Firemen each year taking representation rights for engineers on more railroads so that by 1946-1947 the firemen held the bargaining rights for engineers on 17 railroads and the engineers did not hold bargaining rights for firemen on a single railroad. The table lists the holding of non-traditional crafts in 544 instances on 64 different railroads.

While some of the changes may have been due in whole or part to a recruiting drive, the correlation economic conditions and the shifts from higher crafts to lower crafts and vice versa as reflected by the Engineers or Conductors holding firemen or brakemen's contracts in times of low employment and the Firemen or Trainmen holding engineers or conductors contracts in times of high employment, shows that the changes were primarily the result of an ebb and flow between crafts rather than to recruiting drives. It was this shifting because of ebb and flow which had given rise to the traditional tolerance by operating unions of substantial enclaves of minority union members.

A study of this table shows the economic motivation for the opposition of the operating unions to the bills as originally introduced and makes clear that the literal

language of Section 2, Eleventh (c) was precisely tailored to meet the needs of the operating employees.

Three different solutions for the problem of interrelationships between operating craft unions were proposed prior to the final solution embodied in Section 2, Eleventh (c) as enacted. The first was that of protecting employees from denial of membership in the contracting union because of membership in another union, which appeared in both the House and Senate bills as introducted. See testimony of George Harrison last quoted above.

The second solution was that proposed by Harry See, appearing as the legislative representative of the defendant Trainmen's Union who proposed an amendment which reads as follows: (Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, pp. 68-69; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess. on H. R. 7789, pp. 32-33):

> "provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them."

Mr. See's proposed amendment, while it went a long way towards meeting the problem presented, did not fully solve it. In most instances the labor organizations not party to the union shop agreement, in which the employee desired to retain membership, would be the duly designated or recognized craft or class representative of the craft or class in which the employee had previously been employed. Mr.

See's proposed amendment would fully cover this situation. But it had also always been the custom in the industry for each of the five existing operating labor organizations to respect membership in any one of them even when the employee in question had not during his last previous employment in another craft or class been employed in a craft or class represented by that organization. This respect included not only tolerance of membership in the other brotherhood but also abstention from pressure to join the contracting union. For instance, sometimes so many engineers are demoted to firing that the B. L. E. represents a majority of those in the craft or class of firemen and becomes the duly designated representative of the craft or class of firemen. In such situations it is traditional that many of the firemen, continue to be members of the Brotherhood of Locomotive Firemen and Enginemen and never to join the Brotherhood of Locomotive Engineers. But Mr. See's amendment would have excluded them from its protection and if the union shop amendment had been adopted in the form suggested by Mr. See these firemen would be required to join the B. L. E. The reverse situation also occurs. And there are other logical variants of these situations as is readily apparent.

This proposal of the defendant Trainmen's Union was rejected because it was not deemed desirable to disrupt the prevalent practice on the railroads, existing only around the operating crafts, for substantial groups of employees to hold membership in either the Brotherhood of Locomotive Engineers or the Brotherhood of Locomotive Firemen and Enginemen, on railroads where the other of these two organizations held the labor contracts; for substantial groups of employees to hold membership in either the Order of Railroad Conductors or the Brotherhood of Railroad Trainmen, on railroads where the other of these two organizations held the contract; and for a

substantial minority of yard service employees to hold membership in the Switchmen's Union when the Trainmen held the contract or to hold membership in the Trainmen's Brotherhood when the Switchmen held the contract.

Especially in situations where a union holds contracts for two crafts is it usual for a large minority to persist in its membership in the other union. Thus on some railroads the Locomotive Engineers is the certified representative of both the engineers craft and the firemen craft. On these railroads regularly there exists a substantial minority of both engineers and firemen who belong to the Brotherhood of Locomotive Firemen and Enginemen. Indeed when employment has been very low, the engineers may be the majority representative of both crafts. When employment is high, the Brotherhood of Locomotive Firemen and Enginemen may be the duly certified representatives of both crafts and hold contracts for both the engineers and the firemen's craft, with a substantial minority retaining membership in the Engineers. Usually engineers have rights to serve either as an engineer or fireman but many firemen may serve substantial lengths of time before they acquire any right to serve as an engineer. On some roads traditionally the Engineers have over the years represented both crafts; on others the Firemen have over the years continuously represented both crafts. In all instances there are a substantial minority in the other union.

A somewhat similar situation exists with respect to the Switchmen, Conductors and Trainmen.

The annual reports of the National Mediation Board to Congress, Reports One through Sixteen, covering the period of 1934 to 1950, which we have collated in Appendix A at the end of this brief show that there were a total of 544 instances during this period, involving 64 railroads, in which the minority enclave had become a majority and had taken over the contract traditionally held by another union.

Thus, this table shows that in 1935 the Brotherhood of Locomotive Engineers held both the engineers and the firemen's contract on five railroads. Employment was low during this period and so many engineers had been demoted that the engineers were the majority of the firemen's craft as well as of the engineers' craft.

In subsequent years, when employment increased greatly due to the Second World War, the Brotherhood of Locomotive Firemen took over the contracts on both the engineers craft and firemen's craft on 15 railroads by 1944, and 17 by 1946, 16 of which it still held in 1950 when the union shop amendments were before Congress. If the Trainmen's proposal set forth by Mr. See had been adopted the Firemen could have wiped out all membership of Engineers on these 16 railroads. Both during the hearings and on the floor of Congress the Brotherhood of Locomotive Engineers made plain its complete opposition to the bill. Hearings in Senate, *Op. cit.*, pp. 77-87; Hearings in House, *Op. cit.*, pp. 192-194; 96 Cong. Rec. 16320-2, 16329-16330, 17052, 17059.

The Senate and House committees each reported its respective bill without the Trainmen's proposal. (Senate Report No. 2262, on S. 3295, 81st Cong., 2nd Sess.; House Report No. 2811, on H. R. 7789, 81st Cong., 2nd Sess.). However, before the bills came before either the Senate or the House for consideration, members of these committees met with representatives of the Railway Labor Executives' Association and the American Federation of Labor and agreed that when the reported bills were presented to Congress, the respective Senate and House Committees would unanimously report an amendment reading as follows (96 Cong. Rec. 15735, col. 3, Senate on September 23, 1950; 96 Cong. Rec. 17052, col. 2, House on January 1, 1951):

> "*Provided further*, that no such agreement shall require membership in more than one labor organization;"

The Switchmen's Union, as well as the Brotherhood of Locomotive Firemen and Enginemen and the Order of Railway Conductors, were at that time members of the Railway Labor Executives' Association, which agreed to this amendment on behalf of their constituent unions. The Trainmen's Union was not a member of this organization at that time (Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295, May 1, 1950, p. 7), and did not support this amendment (96 Cong. Rec. 15738, col. 2).

Senator Hill was in charge of the bill in the Senate and Congressman Harris was in charge of the bill in the House. When S. 3295 came before the Senate for consideration on September 23, 1950, Senator Hill stated (96 Cong. Rec. 15735, col. 2):

> "Mr. President, the bill was unanimously reported by the Senate Committee on Labor and Public Welfare, but there were three members of the committee, the Senator from Ohio [Mr. Taft], the Senator from Missouri [Mr. Donnell], and the Senator from New Jersey [Mr. Smith], who felt that there were several questions raised by the bill which were not adequately taken care of as they should be. These three members reserved the right to offer such amendments as they thought might be fitting and might take care of the questions raised.
>
> "Since the report of the bill by unanimous action of the committee, these amendments have been worked out, they have been agreed upon, and on behalf of the senior Senator from Ohio [Mr. Taft] and myself, I have offered the amendments. I should like at this time to have the amendments reported so that in my discussion I may discuss the bill with the amendments."

The legislative clerk then read the amendment (96 Cong. Rec. 15735, col. 3):

> "On page 2, * * * line 21, to strike out the comma, sub-

stitute a colon, and the following: *'Provided further,* that no such agreement shall require membership in more than one labor organization';"

Senator Hill then explained this amendment as follows (96 Cong. Rec. 15736, col. 3):

> "An employee could belong to as many different unions as he wished to belong to. But he cannot be required to belong to one. If he belongs to one, he meets the provisions of the statute, and he cannot be required to pay dues to or to belong to more than one union."

Senator Hill then proceeded to explain that (96 Cong. Rec. 15738, col. 2):

> "There are four railway labor organizations which are not now supporting the bill."

These four organizations were the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. The Switchmen's Union, as represented by the Railway Labor Executives Association, was supporting this bill as so amended.

Consideration of the bill was postponed until December 6, 1950. When the bill came before the Senate on December 6, 1950, consideration was delayed another 24 hours to give the unions who were opposing the bill an opportunity to agree upon an amendment (96 Cong. Rec. 16189, col. 3). By the end of December 6, 1950, three of the four opposing unions had come to agreement with the Railway Labor Executives Association and representatives of the Congressional committees on the language which now appears in the statute as Section 2, Eleventh (c) (96 Cong. Rec. 16261, 16330).

On December 7, 1950, Senators Taft and Hill offered the agreed upon amendment, stating that it was drafted by the Brotherhood of Locomotive Firemen and Enginemen, the

Order of Railway Conductors and the Brotherhood of Railroad Trainmen and it was adopted by the Senate that same day (96 Cong. Rec. 16268, col. 2). On December 11, 1950, the Senate passed S. 3295, as so amended (96 Cong. Rec. 16378). By letter dated the following day, December 12, 1950, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and the Brotherhood of Locomotive Firemen and Enginemen wrote the chairman of the House Rules Committee that the amendment adopted by the Senate made S. 3295, as passed by the Senate, acceptable to them.

On January 1, 1951, the House by a roll call vote agreed to consider S. 3295, in place of the substantially similar H. R. 7789, which was in the House Calendar for that day (96 Cong. Rec. 17046, col. 3—17047, col. 3).

Congressman O'Hara of Minnesota inserted in the Congressional Record a statement on behalf of the Brotherhood of Locomotive Engineers opposing adoption of either H. R. 7789, as reported or S. 3295, as passed by the Senate. This statement, in material part, read as follows (96 Cong. Rec. 17052, col. 2):

> "Three amendments to bill H. R. 7789 were given favorable consideration by the House Committee on Interstate and Foreign Commerce, subsequent to August 7, 1950 when the bill was reported out of committee with House Report 2811.
>
> "* * * the second amendment proposing: *Provided further,* that no such agreement shall require membership in more than one labor organization, appears to merit considerable attention and there must be some controversy as to whether an employee, as a young man, was in service as a waiter in a railroad restaurant and joined the union of such employees, might assume that his union card in the waiters' union should qualify him for rights in the other 127 different crafts and/or divisions of crafts identified by the Interstate Com-

merce Commission as being railroad employees, if those other crafts had contracts with the different railroads under the authority of this legislation."

Congressman Harris served as the spokesman for the House Committee on Interstate and Foreign Commerce, in guiding this legislation through the House. On January 1, 1951, immediately preceding the adoption on that same day by the House of the Senate bill, as amended by the Senate, Congressman Harris explained the history and purpose of Section 2, Eleventh (c) to Congress as follows (96 Cong. Rec. 17059, cols. 2-3):

"The similar House bill, H. R. 7789, was a subject of lengthy hearings by our committee during May and June of 1950. During the course of the hearings differences of opinion developed * * * among labor organizations themselves, particularly those in operating services over the possible requirement that certain employees be required to maintain membership in more than one union.

"We in the committee attempted to determine and resolve these differences * * *

"It was not entirely satisfactory, therefore, subsequently certain further questions arose over the definiteness of the protection afforded operating employees against being compelled to belong to more than one union * * *

"As the bill was reported * * * the operating brotherhoods opposed it. On September 11, 1950, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, directed a letter to Senator Lucas opposing the bill S. 3295, before the Senate in its present form.

"The following day, September 12, 1950, a letter directed to the members of the Rules Committee of the House signed by representatives of all four of the operating brotherhoods, the Locomotive Engineers, the Firemen and Enginemen, the Brotherhood of Railway Conductors, and the Brotherhood of Railroad

Trainmen, opposing H. R. 7789, which had been reported by our committee and stating that the proposed amendments in their opinion 'make the bill more unsatisfactory'. They, therefore, requested the Rules Committee to decline a rule on the proposal.

"In December, these * * * differences * * * were matters of amendment on the Senate floor during the consideration of the bill by that body. Clarification of the amendments was made. There were adjustments and the bill in the amended form as it comes to us now from the Senate appears to be endorsed and actually urged by 21 of the 22 national railroad labor organizations.

"On December 11, three of the four operating brotherhoods, the Firemen and Engineers, Order of Railway Conductors and the Trainmen, wrote a letter to the chairman of the House committee, to the effect that they had been opposed to railway union shop bills, S. 3295 and H. R. 7739, but the Senate had just passed S. 3295, and incorporated therein a measure which makes the proposal entirely satisfactory. Having cleared up these * * * issues, they urged that the Senate bill, 3295, which we have before us today, be passed."

Congressman Harris explained Section 2, Eleventh (c) as follows (96 Cong. Rec. 17059, col. 3):

"I have stated the purposes of this proposed amendment. Now the two principal changes in this Senate-passed bill from the House bill as reported by the committee are:

"* * * the addition of *subparagraph (c)* which *leaves the individual employee in the operating services the choice of operating union to which he will belong*, and this specifically resolves any doubt concerning a possible requirement of dual membership. However, if any employee is not a member of any union at the time of union shop agreement, if any, he must join the craft of the bargaining agent, within the 60 days in which he is working at the time." (Emphasis supplied.).

The House proceeded immediately thereafter — three pages later in the Congressional Record—to adopt this bill (96 Cong. Rec. 17062).

That the Senate likewise understood this was the meaning of Section 2, Eleventh (c) see the statement of Senator Holland describing the amendment which became the present Section 2, Eleventh (c) as (96 Cong. Rec. 16322, col. 1):

> "an amendment of a type which would make membership in one union among the operating brotherhoods sufficient."

Numerous Congressmen explained the bill as directed only at employees who do not belong "to one of the brotherhoods" (Congressman O'Hara, 96 Cong. Rec. 17052), "who are not now in one of the unions" (Congressman Harris, 96 Cong. Rec. 17060) and "who are not members of any union" (Congressman Wolverton, 96 Cong. Rec. 17050).

There has grown up in Congress over the years a practice of allowing railroad unions, either by themselves, or in conjunction with the railroads, to draft the language of statutes applicable to railway labor. See Hearings before the Committee on Interstate and Foreign Commerce, House, 69th Cong., 1st Sess., on H. R. 7180, pp. 9, 11 (Railway Labor Act of 1926); Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H. R. 6956, pp. 12-13 (Railroad Retirement Act of 1937); [84 Cong. Rec. 6631]; Hearings before Committee on Interstate and Foreign Commerce, House, on H. R. 9706, 76th Cong., 3rd Sess. pp. 15, 22, 24, 26, 86, 87, 143; 86 Cong. Rec. 5522, 9645, 12877; 97 Cong. Rec. 13642 (Amendments to Railroad Unemployment Insurance Act).

Where the language of the statutory provision, as here, is drafted by the railway labor unions themselves, within a matter of days before their language is submitted

to and adopted in Congress, and without any hearings subsequent to the formulation which became the law, the language itself is more compelling than any Congressional statements.

C. For the First Fifteen Years Following Its Enactment, Section 2, Eleventh (c) of the Railway Labor Act Was Uniformly Construed and Applied by the Brotherhood of Railroad Trainmen, by the Erie Lackawanna Railroad, by All the Other Railroads and Operating Unions, All Administrative Agencies and All Courts to Permit Membership in Any Standard Operating Union to Satisfy Union Shop Requirements.

This Court has uniformly refused to overturn a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Assn's.*, 310 U. S. 534, 549, quoting from *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. To the same effect see *Labor Board* v. *Driver's Local Union*, 362 U. S. 274, 290; *United States* v. *Chi., N. S. & Mil. R. Co.*, 288 U. S. 1, 13-14; *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 25, 26; *United States* v. *South Buffalo Ry. Co.*, 333 U. S. 771, 774-775; *United States* v. *Ryan*, 284 U. S. 167, 174-175. This principle is even more applicable where as here the statute was drafted in pertinent part by those who later construed and applied it, as here.

From 1952 until the present contract of February 1, 1967, for a period of fifteen years all the union shop contracts executed by the Trainmen's Union and by all the other standard operating unions contained the exact language of Section 2, Eleventh (c) written out in full in the

contract as an exception to the requirement of membership in the contracting union and all of these contracts were uniformly applied by carriers, unions, adjustment boards, arbitrators and courts to permit membership in any of the five operating unions who have members on the First Division of the National Railroad Adjustment Board as satisfying the requirement of membership in the contracting union. David Levinson, Union Shop Under the Railway Labor Act, 6 Lab. Law Journ. 441, 444 (July 1955).

Indeed it was not until almost ten years after the decision in *Rychlik* (352 U. S. 480) that the Brotherhood of Railroad Trainmen suddenly discovered in that decision the meaning it now attributes to it.

Not until 1967 did the Brotherhood of Railroad Trainmen begin entering into contracts which do not expressly write in the language of Section 2, Eleventh (c). All of the contracts which are collected in Brotherhood of Railroad Trainmen's exhibits in this case as illustrative of other contracts of a similar nature to which it is a party are dated in 1967 (R. 95a-120a). Prior to 1967, we have not been able to find a single instance in which any standard operating union ever construed its union shop contract as not permitting membership in the other standard operating unions to satisfy the membership requirement.

Indeed, the second sentence of the opinion in *Rychlik*, 352 U. S. at pp. 481-482, recites this alternate membership as one which accords with the requirements of the statute. This Court stated (352 U. S. at pp. 481-482):

> "In accordance with Section 2, Eleventh (a) and (c) of the Railway Labor Act, the Brotherhood and the Railroad negotiated a union shop contract in 1952, which required trainmen employed by the Railroad to become members of and retain membership in the Brotherhood or in another labor organization 'national in scope' and 'organized in accordance with the Railway Labor Act'."

The union shop agreement involved in *Rychlik* is printed at record pages 7-13 of the record in the Supreme Court in *Rychlik,* No. 56, O. T. 1956. At p. 13 of the record appears as one of the exceptions to membership the language of Section 2, Eleventh (c) copied into the contract.

Neither the Brotherhood of Railroad Trainmen nor any other party in *Rychlik* argued to this Court that Rychlik's membership in UROC was insufficient because UROC held no contracts or because Rychlik did not have interchangeable rights between crafts. No one thought this a defense. The only argument was that membership in UROC did not meet the literal language of Section 2, Eleventh (c) because the term "national in scope" was a term of art having the same meaning as Congress gave to that term in Section 3, First (a) of the Railway Labor Act specifying this as a requirement for selection of members of the National Railroad Adjustment Board.

In its brief to this Court in the *Rychlik* case, contrary to the position taken in its brief here, the Brotherhood of Railroad Trainmen recognized that membership in any of the organizations national in scope assured that dues paid to any one of the organizations would contribute equally to costs of the collective bargaining machinery. Before quoting this portion of the Trainmen's brief in this Court in the *Rychlik* case, we should explain that at all times from the enactment in 1934 of the amendment to the Railway Labor Act providing for the National Railroad Adjustment Board to date the First Division has had five members, one from the Switchmen's Union, one from the Order of Railway Conductors, one from the Brotherhood of Railroad Trainmen and the other two respectively from the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. Each union pays the expenses of its own members. The five labor members always vote as a bloc. Hence each the Switchmen's Union

and the Order of Railway Conductors pays exactly the same amount as the Brotherhood of Railroad Trainmen towards maintaining the members of the National Railroad Adjustment Board. As we shall show hereinafter, there are numerous other respects in which all five operating unions share equally in negotiating and policing collective bargaining agreements for all five unions on a joint basis. It was this recognition that led to the following statement in "Brief for Petitioner Brotherhood of Railroad Trainmen," *Pennsylvania R. R. Co.* v. *Rychlik,* No. 56, O. T. 1956, p. 30:

> "'If the union fails to seek qualification through Section 3, First (f) procedure it will thereby warn all employees in advance of the grave risk they take in joining a union that lacks elector status. See Note, 69 Harv. L. Rev. 1512 (1956). But the individual does not hereby lose any rights under the statute. He is merely put on notice that membership in such a union will not constitute compliance with the union shop requirement.
>
> "One result of imposing upon the union the obligation of utilizing the procedure of Section 3, First (f) if it desires 'national in scope' status is to remove the possibility of a non-national union enjoying status under the Act without assuming 'its fair share of the burdens and responsibilities attendant upon the administration of the Act.' *Pigott* v. *Detroit T. & I R. Co.,* 116 F. Supp. 949, 955 (E. D. Mich. aff'd, 221 F. 2d 736 (C. A. 6).) Most of the financial cost of enforcing the Act and maintaining its administrative processes is borne by the qualified unions. That cost is reflected in the dues of each qualified union. Unless a union were obligated to participate in the Adjustment Board machinery before qualifying under the union shop requirement, it might acquire an unfair advantage over the qualified unions by way of reduced dues."

The foregoing interpretation of the provisions of Section 2, Eleventh (c), as satisfying the requirement for

financial support of the collective bargaining machinery by membership in any of the unions having members on the First Division of the National Railroad Adjustment Board, allowed membership in any of the other four to satisfy the membership requirements of the contracting union's union shop contracts.

For other cases involving the Brotherhood of Railroad Trainmen where the court opinion mentions that its union shop contract permits alternate membership in any of the other unions national in scope, see *Pigott* v. *Detroit, Toledo and Ironton R. Co.*, 221 F. 2d 736, 739 (6th Cir. 1955), certiorari denied, 350 U. S. 833, where the court said:

> "Accordingly, as required by the statute, the union shop agreement also excepted from the necessity of joining the Brotherhood all those employees who belonged to another labor organization 'national in scope' and 'organized in accordance with the act'."

See also: *Alabaugh* v. *B & O R. Co.*, 125 F. Supp. 401, 407 (D. Md.), aff'd, 222 F. 2d 861 (4th Cir. 1955), cert. den., 350 U. S. 839; *B. L. F. & E.* v. *Northern Pac. Ry. Co.*, 279 F. 2d 641, 645 (8th Cir. 1960); *UROC* v. *Northern Pacific R. Co.*, 208 F. 2d 135 (9th Cir.) cert. den., 347 U. S. 929; *UROC* v. *Wyer*, 115 F. Supp. 359 (S. D. N. Y., 1953), aff'd, 205 F. 2d 153 (2d Cir. 1954), cert. den., 347 U. S. 929; *Bohnen* v. *B & O R. Co.*, 125 F. Supp. 463 (N. D. Ind.).

Prior to the decision of Judge Herlands in this case, there were no reported cases so far as we know involving the right of any member of a standard operating union to meet union shop requirements of any other operating union by maintaining membership in his own union. The reason is that all five unions have heretofore uniformly interpreted and applied the statute in this manner. Indeed, the Trainmen's union admits that the Union Shop agreement between the Trainmen and the Erie in effect prior to

March 14, 1967, permitted membership in the Switchmen's Union or the Conductors to satisfy the requirement of membership for union shop purposes. Neither *Rychlik* nor *Rohrer* v. *Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127 (3rd Cir.), involved a union shop agreement with a standard operating union which was being used to require a member of another standard operating union to change his membership in order to hold his job. Indeed in *Rohrer,* the Trainmen argued for the construction which the Switchmen and Conductors urge in the instant case.

Subsequent to the decision of Judge Herlands we have had decisions in *Dirks* v. *Birkholz,* No. 172, this Term, by the Seventh Circuit, and in *Carter* v. *Richmond, Fredericksburg, and Potomac Railroad Company,* No. 4398, by the District Court for the Eastern District of Virginia, decided September 12, 1968, holding union shop agreements similar to the one here involved, invalid.

This uniform construction of Section 2, Eleventh (c) by the unions which themselves drafted its language and presented it to Congress should carry considerable weight. As the Seventh Circuit stated in *Birkholz* v. *Dirks,* 391 F. 2d 289, 293, pending here on certiorari, No. 172, this Term:

> "The Trainmen's position would suggest that the drafters of 2 Eleventh (c), including itself, did not know what the Section meant and have been misapplying it for fifteen years."

The Second Circuit in the instant case cited the decision of the Seventh Circuit in the *Birkholz* case with approval (R. 9a). And Judge Palmieri, in his opinion granting summary judgment for the plaintiffs in the instant case in the district court referred to the uniform practice of the Trainmen and all other operating unions from 1951 to 1967 (R. 27a).

D. Membership in the Switchmen's Union or Conductors' Union Contributes to the Financial Support of the Collective Bargaining Apparatus Applicable to Operating Employees Equally as Much as Membership in the Trainmen's Union.

The Trainmen (Br., pp. 8-9) argue that membership in the Switchmen's Union or Conductors' Union fails to meet the purposes of Congress in enacting the union shop amendment to the Railway Labor Act because money paid to the Switchmen or Conductors' Union does not support collective bargaining for employees represented by the Trainmen. This is not true. As the Brotherhood of Railway Trainmen itself pointed out to the Supreme Court of the United States in its brief in the *Rychlik* case in the portion above quoted all labor organizations national in scope share in the financial support of the collective bargaining machinery applicable to operating employees. Each of the five maintains a member on the National Railroad Adjustment Board. Each contributes to the support of the Railway Labor Executives Association. All participate together in many of the major national negotiations. Congress gave statutory recognition to this pooling of resources when it made membership in any of these five unions equally a satisfaction of a union shop agreement with any one of them.

Long prior to the enactment of Section 2, Eleventh (c), the five operating unions had established a practice of conducting all their major negotiations on a joint basis. In its Fourth Annual Report, that for fiscal year ended June 30, 1938, pp. 3-4, the National Mediation Board stated:

> "* * * included among these mediation settlements were two affecting more employees and involving a larger sum total of adjustments in payroll expenses than any other case mediated since the enactment of

> the Railway Labor Act in 1926. This was due to the fact that the labor organizations concerned speaking for virtually all railroad employees on the one hand, and the railroad managements, speaking for virtually all of the Class I carriers on the other hand, had arranged to handle negotiations and subsequent proceedings on a national basis through comparatively small conference committees."

And at page 21 of the same annual report, the National Mediation Board describes one of these settlement agreements as involving "the five transportation brotherhoods, speaking for the so-called transportation employees" in negotiating wage increases and employment guarantees.

In its Sixteenth Annual Report, for fiscal year ended June 30, 1950, *which was the last year prior to the enactment* of Section 2, Eleventh (c), the National Mediation Board reported to Congress (at page 3):

> "For many years the labor organizations on the railroads, generally referred to as the non-operating groups, handled their disputes independently. In recent years they have acted concertedly in all movements involving adjustments in wages nationally, and in connection with the 40-hour week. The principal carriers have authorized regional conference committees to deal with these organizations collectively on a nationwide basis. This practice, however, has been followed for many years in connection with the so-called operating groups."

The annual reports of the National Mediation Board are filled with instances where the Switchmen's Union or Conductors' Union, the Trainmen and one or more of the other standard operating unions act jointly in negotiations, presentations to National Emergency Boards appointed by the President and to arbitrators or in other aspects of collective bargaining. *E.g.*, 4th Annual Report of N. M. B. for fiscal year ended June 30, 1938, p. 21; 10th Annual Report, pp. 35, 70; 11th Annual Report, pp. 31-32; 16th Annual Report,

pp. 4, 57, 63; 17th Annual Report, pp. 7-8; 26th Annual Report, p. 16; 27th Annual Report, p. 17; 28th Annual Report, p. 14; 29th Annual Report, pp. 14-15; 30th Annual Report, pp. 15-18. This cooperation and joint action is reflected in the reported decisions of the courts. See for example *BLE, et al.* v. *B & O*, 372 U. S. 284. For a summary of the many joint negotiations from 1934 to 1950 see Jacob J. Kaufman, Collective Bargaining in the Railroad Industry (Columbia Univ. 1954), pp. 46-50.

During the hearings which preceded the enactment of Section 2, Eleventh (a), witnesses testified with respect to the complicated machinery for bargaining which the unions supported. Thus George M. Harrison testified (Hearings before Senate Committee, *op. cit.* p. 16; compare Hearings before House Committee, *op. cit.*, p. 50):

> "* * * collective bargaining in the railroad industry is more complex. The administrative machinery is more complete and complex. The mediation, arbitration and Presidential Emergency Board provisions of the act * * * are very costly to the unions. The handling of agreement disputes through the National Railroad Adjustment Board also requires expense * * *"

The Second Circuit in its opinion below found the sharing of costs by unions an answer to the contention that a literal construction was inconsistent with the objective of eliminating the "free riders". The Second Circuit stated (R. 18a):

> "It is true * * * the purpose of the union shop is to prevent * * * 'free riders' * * *. But we cannot say the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose."

The share of the costs of this national bargaining apparatus which each of the five operating unions bears is so

substantial as to assure that none of them can afford to take in any member for a nominal initiation fee, dues or assessments. By the time the union shop amendment was adopted each of the unions had constitutions fixing the amount of initiation fee and dues, and usually limiting the amount of assessment. George M. Harrison, testifying in opposition to any regulation of the rate of fees or dues, relied on the established character of the unions' financial structures, based on constitutions which he described as having "been in existence, some of them, for as long as 100 years." Hearings before Senate Committee, *op. cit.*, p. 33. See also Hearings before House Committee, *op. cit.*, pp. 19, 72. The unions which got together and drafted subparagraph (c) were familiar with the practices of each of the five operating unions as to dues and realized that each had obligations which prevented any substantial lowering of its dues structure.

While the Brief of the Brotherhood of Locomotive Engineers as Amicus Curiae, p. 4, scoffs at the notion that the draftsmen could have intended membership in the Switchmen's Union to satisfy an Engineer's union shop, so far as eliminating free riders, it clearly did so. If any engineer wished to join the Switchmen rather than the Engineers, he would cease to be a free rider and contribute his fair share to the expenses of bargaining.

The assumed lack of mutual interest between Switchmen and Engineers, which the brief amicus suggests is belied by the fact a Switchmen representative has an equal say with an Engineers representative in the disposition of all grievances of engineers that come to the National Railroad Adjustment Board, and that the Switchmen and the Engineers have often participated in joint bargaining in issues handled nationally. See references to the Annual Reports of the National Mediation Board last cited.

With respect to any implausibility that Congress in-

tended such alternate union membership, it must be recalled that each the Senate and the House Committee reported to Congress an amendment which would have permitted membership in any labor union to satisfy a union shop requirement (96 Cong. Rec. 15735, col. 3; 96 Cong. Rec. 17052, col. 2). If Congressional spokesmen were satisfied with membership in any union, clearly membership in one of the five cooperating operating unions was just what they intended when they substituted subparagraph (c) for their amendment permitting alternate membership in any union to satisfy any union shop agreement on the railroads.

E. The Trainmen's Construction of Section 2, Eleventh (c) of the Railway Labor Act, Reads the Last Proviso Thereof Out of the Statute.

The last proviso in Section 2, Eleventh (c) of the Railway Labor Act reads:

> "That nothing herein or in any such agreement or agreements shall prevent an employee from changing to another organization admitting to membership employees of a craft or class in any of said services."

Over the fifteen years since the enactment of the union shop amendment to the Railway Labor Act, all standard operating unions have interpreted Section 2, Eleventh (c) as allowing free change of membership from one to another of the standard operating unions without any claim that there was any violation of the union shop agreement so long as the employee held membership at all times in at least one of these unions. This conforms with the pooled concept evident in the whole of Section 2, Eleventh (c). Defendants offer no way of reconciling their interpretation with this language. The Brotherhood of Railroad Trainmen's interpretation of the statute affords no opportunity

for an employee who is a member of the contracting union ever to change his membership so long as he was employed in the same craft or class. But the statute gives him the right to change out of the contracting union even though he does not move to another craft. Only by construing the language of this section to allow alternate membership at all times, can the language of the proviso be given effect. See *Felter* v. *So. Pac. Co.*, 359 U. S. 326, 337 (1959).

F. The Trainmen Misread the Rychlik and Rohrer Cases.

The Trainmen rely upon *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480 and *Rohrer* v. *Conemaugh & Black Lick Railroad Company*, 359 F. 2d 127 (3rd Cir.).

This Court in the *Rychlik* case did not have before it the issue here presented and made no ruling relevant to the instant case. It is true this Court referred to the ebb and flow relationship between the crafts as explaining the reason for the provisions for alternate membership which are present in the union shop amendment to the Railway Labor Act. But nowhere in this Court's decision is there any basis for concluding that the Court would distort the plain language of Section 2, Eleventh (c) to make it conform to the main reason for the provision for alternate membership. Certainly, the Court did not have before it the legislative history showing that the Trainmen proposed language to Congress strictly limited to the ebb and flow problem and that Congress rejected this language and adopted a broader form of alternative membership which conformed more fully to the prevalent practice of substantial enclaves of the minority union existing peacefully over the years in the jurisdiction represented by a majority union.

We submit that if this Court had construed the statute as the Trainmen contend, the Court would have had no need to spend pages deciding whether the term national

in scope was used in its common meaning or as a word of art having the same meaning as when used in Section 3, Third (a). This Court expressly placed its decision solely on the point of the meaning of national in scope. This Court states at the beginning of its opinion:

> "For the reasons hereafter given, we hold that Section 2, Eleventh (c) allows alternate union membership only in those unions which have already qualified under Section 3, First of the Act, as electors of the union representatives on the National Railroad Adjustment Board, and not membership in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Railway Labor Act."

The Court would not have any occasion so to rule if membership was limited to a union holding a contract. Admittedly UROC held no contract on the Pennsylvania R. R. Co. nor did any of the parties or amicus curiae ever so much as suggest that alternative membership was restricted to unions holding contracts or to employees having interchangeable craft rights. No language in the statute is susceptible of this construction. That the Court did not intend its references to the purpose of Section 2, Eleventh (c) to limit the literal language is made plain by the reference to *Rychlik* contained in *Felter* v. *So. Pac. Co.*, 359 U. S. 326, 337 (1959) where it is cited as holding Section 2, Eleventh (c) gives employees the right to change unions in the area of the five standard operating crafts. This shows *Rychlik* means just the opposite of what the Trainmen find in it.

Rohrer v. *Conemaugh & Black Lick Railroad Co.*, 359 F. 2d 127, involved an industrial unit, not a craft unit. Thus at page 128 the court recites that "the National Mediation Board had certified the Union as the bargaining representative of all the employees of the Railroad regardless of their class or craft." *Conemaugh & Black Lick Railroad*

Co. is a wholly owned and consolidated subsidiary of the Bethlehem Steel Company. All of its employees were represented by the United Steel Workers Union. It was organized and functioned as an industrial operation rather than as a railroad. The provisions of Section 2, Eleventh (c) are by their terms only applicable to situations where employees are organized and the union certified on the basis of crafts or classes limited to operating employees, namely the "engine, train, yard or hostling service." The *Rohrer* case presented a problem for which Congress obviously did not legislate when it adopted Section 2, Eleventh (c).

The first amendment presented to Congress by Senators Taft and Hill in the Senate on September 23, 1950 (96 Cong. Rec. 15735, col. 2) treated all organized labor as one pool for purposes of a union shop. It would have allowed the membership requirement in a contract with any one union to be satisfied by membership in any other union (96 Cong. Rec. 15736, col. 3). This proposal was unacceptable because evasion by forming a new cheap dues organization was too simple. A pool composed of all union members was not all inclusive, unless there was some way of limiting the pool to members of unions bona fidely engaged in the kind of expert servicing of workers which is the earmark of unions recognized as part of the established labor movement.

The solution of limiting the pool to members of organizations participating on the National Railroad Adjustment Board, was hit upon as solving this problem. The solution preserved the traditional relationship which had existed for half a century between the five railroad operating unions. There is no indication anyone considered what rules should govern if the contracting union was not itself one of the unions with membership on the National Railroad Adjustment Board. This was the problem presented by *Rohrer* v. *Conemaugh & Black Lick.* The Court there decided that the

whole pooled concept was inapplicable when the contract was not with one of the unions in the pool. Certainly, this decision offers no guidance in a case where all the unions involved are ones which Congress had specifically in mind in setting up a pooled concept of union shop.

Congress by defining the organizations whose members were to constitute a pool for purposes of Section 2, Eleventh (c), as those naming members to the Adjustment Board, created a pool composed of members of the Engineers, Firemen, Conductors, Trainmen and Switchmen's Union. The contracting union in the *Conemaugh & Black Lick* case was the Steelworkers. Its members were not part of the pool. Dues to the Steelworkers did not contribute to joint contract movements with the Trainmen. There was none of the averaging out of costs between Steelworkers and Trainmen which is present between Trainmen and Switchmen due to the fact that on roads where the Switchmen hold the contract, Trainmen members get its benefits, just as on roads where the Trainmen hold the contract, Switchmen members get its benefits.

While we believe *Rohrer* v. *Conemaugh & Black Lick* was wrongly decided, we suggest that the industrial character of the unit represented, as well as the identity of the contracting union as not one of those participating on the Adjustment Board, make that case inapplicable as a precedent here.

Both the Second Circuit in the instant case (R. 17a-18a) and the Seventh Circuit in the *Dirks* case (391 F. 2d at p. 294), as well as Judge Herlands (R. 42a-45a) in the district court in this case and Judge Oren R. Lewis in *Carter* v. *Richmond, Fredericksburg and Potomac Railroad,* No. 4398, U. S. D. C. E. D. Va., decided September 12, 1968, held *Rychlik* and *Rohrer* inapplicable to the issue here involved.

II.

THE CONSTRUCTION URGED BY THE TRAINMEN IS UNWORKABLE AS IT WOULD CREATE SUCH UNCERTAINTY OVER PERMISSIBLE ALTERNATE MEMBERSHIP AS IN EFFECT TO WIPE SUBPARAGRAPH (c) OUT OF THE STATUTE, WITH RESULTING STRIFE AND DISCONTENT.

The construction urged by the Trainmen calls for judicial legislation without any guides from Congress. Myriads of problems will arise as to what ebb and flow satisfies the criteria for permissible alternate memberships. As Judge Herlands stated in his opinion accompanying the issuance of the preliminary injunction in this case in the district court (R. 40a-41a):

> "The Brotherhood argues that Section 2, Eleventh (c) should not be construed to bar strict union shop provisions when the particular factual circumstances do not involve the problem of intercraft mobility. How—as a practical matter—would such a construction of the statute be implemented?
>
> "On each occasion that a strict union shop agreement is executed, the employees who are members of a minority union would be faced with the dilemma with which the instant plaintiffs are confronted. As here, the question of the validity of the agreement inevitably would find its way into the federal courts for an ad hoc adjudication.
>
> "But what evidence should be admitted, and what standards should the Court employ in determining the quality and magnitude of the problem of intercraft mobility in a particular situation? Is the Court to make a subjective evaluation of the relatedness of various crafts, the mobility of individual employees, the likelihood of change in the bargaining representative resulting from shifts in employment, etc.?
>
> "While the Brotherhood asserts that a possible standard could be whether the minority union is the

designated or recognized representative of any related class or craft, the legislative history indicates that this approach was explicitly suggested to the Congressional committees by the Brotherhood but not adopted by them."

Since union shop agreements present a threat of loss of jobs, employees will never enjoy the protection Congress accorded them by subparagraph (c) unless the application of that section is clear and written into all union shop agreements in equally clear fashion. Otherwise the fear of loss of jobs will compel membership in the contracting union. The only clear cut exception which will give subparagraph (c) any practical meaning, is to accept its literal language as meaning what it says. This has proved workable for fifteen years of uniform application on all railroads in the United States. To begin to make qualifications and limitations would give rise to uncertainty and unrest and would destroy the intended effect of subparagraph (c).

The conjectures in the briefs filed by the Trainmen and Engineers that strife and unrest follow from the literal interpretation is without basis in fact. There is no evidence that the literal application of subparagraph (c) during the fifteen years following its enactment created any strife or unrest. Indeed the existence of minority union enclaves without any union shop weapon to bring them into the bargaining agent's membership, had existed during the whole period since the Railway Labor Act was enacted in 1926. And even prior thereto union shop agreements had never been utilized by the standard railway labor unions. Hence it is unrealistic to argue that a strict union shop is needed to prevent strife and unrest. Rather a change now in the interpretation of subparagraph (c) would have such a result. This consequence of an adoption

of the Trainmen's position was pointed out by various of the judges who have considered the problem. The Seventh Circuit in the *Dirks* case stated (391 F. 2d at p. 293):

> "The fifteen year practice of allowing membership in any standard operating craft union to satisfy union shop agreements also militates strongly against the Trainmen's argument that the elimination of minority representation would promote peace between unions. It is difficult to see how labor peace would be promoted by abrogating what is, in effect, an agreement between the operating brotherhoods which has guided their relations for fifteen years.
>
> "We believe that the railroad unions responsible for Sec. 2 Eleventh (c) and Congress deliberately chose * * * to avoid upsetting the balance of union power between the majority union bargaining agent and substantial minority union members in the bargaining unit."

Judge Herlands stated (R. 41a-42a):

> "In any event, whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees in the operating crafts without promoting internal warfare between unions."

CONCLUSION.

The Congressional innovation of a more expansive union shop than the traditional one deserves sympathetic treatment by this Court. The traditional union shop, if imposed on operating railroad employees, would upset union practices accepted by all five railroad operating unions for more than half a century. The union shop which Congress provided by Section 2, Eleventh (c) prevents the use of the union shop as a device to build membership in any one operating union by forcing non-consenting members of other operating railway unions into the ranks of any one union. By preserving the traditional tolerance for choice of operating union among all operating employees, Section 2, Eleventh (c) serves a worthwhile objective, which should be given full effect by affirming the judgment below.

Respectfully submitted,

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Attorneys for Respondents.

December 26, 1968.

APPENDIX A.

TABLE OF CARRIERS ON WHICH, DURING THE PERIODS INDICATED, THE NAMED RAILROAD BROTHERHOOD HELD CONTR
AND THE RELATED CRAFT IN WHICH ITS MEMBERS HOLD SENIORITY RIGHTS BUT WHICH IS TRADITIONALLY REPRESENTE

(Where BLE is listed the Brotherhood of Locomotive Engineers held the contract for both engineer's and firem
BLF&E is listed the Brotherhood of Locomotive Firemen and Enginemen held contract for both firemen's and
where ORC is listed the Order of Railway Conductors held the contract for both the conductor's and trainmen's
BRT is listed the Brotherhood of Railroad Trainmen held the contract for both the trainmen's and conductor's or

RAILROAD CARRIERS	1934–1935	1935–1936	1936–1937	1937–1938	1938–1939	1939–1940	1940–1941	1941–1942	1942–1943	1943–1944
Akron, Canton & Youngstown Ry. Co.									BRT	BRT
Atlanta, Birmingham & Coast R. R. Co.				BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
Atlanta & West Point R. R. Co.	BLE	BLE	BLE	BLE						
Bangor & Aroostook R. R. Co.							BRT	BRT	BRT	BLF&E BRT
Bessemer & Lake Erie R. R. Co.							BLF&E	BLF&E	BLF&E	BLF&E
Boston & Albany R. R. Co.				ORC	ORC	ORC	ORC	ORC	ORC	ORC
Boston & Maine R. R.										
Canadian Pacific Lines in Maine & Vermont										
Central R. R. Co. of N. J.										
Charlestown & Western Carolina Ry. Co.	BLE	BLE	BLE	BLE	BLE	BLE				
Chicago & Eastern Illinois Ry. Co.										BRT
Chicago & Illinois Midland Ry. Co.										
Clinchfield R. R. Co.										
Colorado & Southern Ry. Co.									BRT	
Colorado & Wyoming Ry. Co.									BLF&E	BLF&E
Delaware, Lackawanna & Western R. R. Co.										
Denver & Rio Grande Western									BLF&E BRT	BLF&E BRT
Denver & Salt Lake Ry. Co.		ORC								
Detroit & Mackinac Ry. Co.		BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BLE BRT
Detroit, Toledo, & Ironton Ry. Co.		BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
Detroit & Toledo Shore Line R. R. Co.										BLF&E
Duluth, South Shore & Atlantic Ry. Co.										
Erie R. R. Co.									BRT	BRT
Florida East Coast Ry. Co.	BLE	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E				BLF&E
Georgia R. R.	BLE	BLE								
Georgia Southern & Florida Ry. Co.										BLF&E
Gulf, Mobile & Northern R. R. Co.				BLE						
Gulf & Ship Island R. R. Co.	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE
Illinois Terminal R. R. Co.		BRT	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
International-Great Northern R. R. Co.										

APPENDIX A.

THE PERIODS INDICATED, THE NAMED RAILROAD BROTHERHOOD HELD CONTRACTS FOR BOTH ITS TRADITIONAL CRAFT
MEMBERS HOLD SENIORITY RIGHTS BUT WHICH IS TRADITIONALLY REPRESENTED BY ANOTHER RAILROAD BROTHERHOOD.

listed the Brotherhood of Locomotive Engineers held the contract for both engineer's and firemen's craft; where
d the Brotherhood of Locomotive Firemen and Enginemen held contract for both firemen's and engineer's craft;
isted the Order of Railway Conductors held the contract for both the conductor's and trainmen's craft; and where
ie Brotherhood of Railroad Trainmen held the contract for both the trainmen's and conductor's craft.)

37	1937–1938	1938–1939	1939–1940	1940–1941	1941–1942	1942–1943	1943–1944	1944–1945	1945–1946	1946–1947	1947–1948	1948–1949	1949–1950
						BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT					
	BLE												
				BRT	BRT	BRT	BLF&E BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
				BLF&E	BLF&E	BLF&E	BLF&E		BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
	ORC	ORC	ORC	ORC	ORC	ORC	ORC						
									BRT	BRT	BRT	BRT	BRT
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						BRT		BRT	BRT	BRT	BRT	BRT	BRT
							BLF&E	BLF&E	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
										BRT	BRT	BRT	BRT
						BLF&E BRT	BLF&E BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E
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	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
							BLF&E	BLF&E	ORC BLF&E	ORC BLF&E	ORC BLF&E	ORC BLF&E	ORC BLF&E
												BRT	BRT
						BRT	BRT	BRT	BRT	BRT	BRT	BRT	BRT
&E	BLF&E	BLF&E	BLF&E				BLF&E	BLF&E					
							BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
	BLE												
	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE					
	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
								BRT	BRT				

Gulf & Ship Island R. R. Co.	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE
Illinois Terminal R. R. Co.		BRT	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
International-Great Northern R. R. Co.										
Lake Superior & Ishpeming R. R. Co.										
Lehigh & New England R. R. Co.			BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
Long Island R. R. Co.										
Maine Central R. R. Co.										
Mississippi Central R. R. Co.										
Missouri & Arkansas Ry. Co.		BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT
Missouri-Kansas Texas										BRT
Missouri-Illinois R. R. Co.						BLF&E	BLF&E	BLF&E	BLF&E	BLF&E
Montour Ry. Co.						BRT	BRT	BRT	BRT	BRT
Monongohela Ry. Co.										BRT
Nashville, Chattanooga & St. Louis Ry.									BLF&E	BLF&E
Nevada Northern Ry. Co.				BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT
New Orleans, Texas & Mexico Ry. Co.										
New York, New Haven & Hartford R. R. Co.					BRT	BRT	BRT	BRT	BRT	BRT
Oklahoma City, Ada-Atoka Ry. Co.			ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC
Pennsylvania R. R.									BRT	
Pennsylvania Reading Seashore Lines									BRT	BRT
Pittsburgh & Lake Erie R. R. Co.										
Pittsburgh & Shawmut R. R. Co.									BLF&E	BLF&E
Pittsburgh & West Virginia Ry. Co.					BRT	BRT	BRT	BRT	BRT	BRT
Richmond, Fredericksburg & Potomac R. R. Co.								BRT ORC	ORC	ORC
St. Louis Southwestern Ry. Co.									BRT	BRT
San Antonio, Uvalde & Gulf R. R. Co.										
San Diego & Arizona Eastern Ry. Co.					ORC	ORC	ORC	ORC	ORC	ORC
Spokane International Ry. Co.										
Texas Mexican Ry. Co.				ORC	ORC					
Texas & Northern Ry. Co.										
Toledo, Peoria & Western R. R. Co.							BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E
Utah Ry. Co.					ORC	ORC	ORC	ORC	ORC	ORC
Virginian Railway Co.										
Western Maryland Ry. Co.										
Western Pacific Ry. Co.									BRT	
Western Ry. of Alabama	BLE	BLE	BLE							

SOURCE: Annual Reports of the National Mediation Board: Table 8 opposite p. 36 in the 1st Annual Report for Fiscal Year ending June 30, 1935; Table 10 opposite 4th; Table 14 opposite p. 27 in 5th, p. 30 in 6th, p. 42 in 7th, p. 43 in 8th, p. 42 in 9th, p. 40 in 10th, p. 51 in 11th, p. 62 in 12th, p. 56 in 13th and p. 56 in 14th; Table Report for Fiscal Year ending June 30, 1950.

BLE	BLE	BLE	BLE	BLE	BLE	BLE	BLE						
BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	
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								BRT	BRT	BRT	BRT	BRT	
BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	
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						BRT	BRT						
		BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	
		BRT	BRT	BRT	BRT	BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	
						BRT							
					BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	BLF&E	
BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE BRT	BLE	BLE BRT	BLE BRT	BLE BRT	BLE BRT	
									BLE	BLE	BLE	BLE	
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ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC	
					BRT		BRT	BRT	BRT	BRT	BRT	BRT	
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ORC	ORC									BRT	BRT	BRT	
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			BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	BLF&E BRT	
	ORC	ORC	ORC	ORC	ORC	ORC	ORC	ORC		ORC	ORC	ORC	
									BLF&E	BLF&E	BLF&E	BLF&E	
							BRT	BRT	BRT	BRT	BRT	BRT	
					BRT								

Board: Table 8 opposite p. 36 in the 1st Annual Report for Fiscal Year ending June 30, 1935; Table 10 opposite p. 29 in 2nd and p. 24 in 3rd; Table 13 opposite p. 32 in in 7th, p. 43 in 8th, p. 42 in 9th, p. 40 in 10th, p. 51 in 11th, p. 62 in 12th, p. 56 in 13th and p. 56 in 14th; Table 12A opposite p. 54 in 15th and p. 70 in 16th Annual

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172

ELMER L. DIRKS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

vs.

W. L. BIRKHOLZ, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, WHO ARE EMPLOYED BY THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

LEE LEIBIK,
RUTH WEYAND,
343 South Dearborn Street,
Chicago, Illinois 60604,
Attorneys for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

vs.

W. L. BIRKHOLZ, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, WHO ARE EMPLOYED BY THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED.

Whether Section 2, Eleventh (c) of the Railway Labor Act, 45 U. S. C. 152, Eleventh (c), should be construed literally so that full effect is given to its clear and un-

ambiguous language providing that membership of an operating employee in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership operating employees, satisfies the membership requirements of any collective bargaining agreement applicable to operating employees, without implying that the satisfying membership is limited to a labor organization which holds a contract for a craft or class in which the employee has an expectation of employment.

STATEMENT.

Inaccuracies in Petitioners' Statement.

Omissions and inaccuracies in the brief for petitioners require that a full statement be presented in this brief. Before doing so we here list the major inaccuracies in petitioners' statement so that in reading that statement this Court may be aware of its deficiencies. The following corrections should be made in petitioners' statement:

1. The statement in the second sentence on page 5 of petitioners' brief that through its General Grievance Committee the Trainmen "negotiates and administers comprehensive collective bargaining agreements setting forth the rates of pay, rules and working conditions for all the Milwaukee's yard service employees" is supported solely by a reference to paragraph 2 of the district court's findings at A. 103. In paragraph 2 the district court instead of finding that the Trainmen through its General Grievance Committee "negotiates and administers" found rather that it "is a party to collective bargaining agreements." The difference is of importance to this case because, as the district court found in paragraph 6 (A. 105), the Switchmen and the Trainmen have "participated" in "the negotiation of particular agreements affecting employees on all Class I railroads (Tr. 27, 31, 32, 33, 34, 83-84, 117-118, 124, 128-129)." The fact that wages, hours, fringe benefits and job protection have continuously since long before the union shop amendments been negotiated nationally by all five operating unions acting jointly[1] makes fully under-

1. The same authority which petitioners cite for their footnote to this sentence, Joel Seidman, The Brotherhood of Railroad Trainmen (J. Wiley and Sons, 1962), pp. 14-15, states, "Although certification under the Railway Labor Act as amended is for a

standable a literal reading of Subparagraph (c) of Section 2, Eleventh and establishes that members of the Switchmen on the Milwaukee bear their full share of financing the meaningful part of collective bargaining applicable to them and other yard employees on the Milwaukee.

2. The statement in the third sentence on page 5 of petitioners' brief that "These representation activities" are financially supported only by Trainmen members is supported solely by a reference to the same paragraph 2 of the district court's findings at A. 103. In paragraph 2 the district court, with respect to this matter, finds: "The activities of the General Grievance Committee receive *direct* financial support only from the membership of the Trainmen" (Emphasis supplied). The district court made no finding either directly or indirectly that the activities of the General Grievance Committee included the negotiation or administration of the agreements which govern the hours, wages and conditions of employment of the yardmen employed by the Milwaukee, and even as to the activities of the General Grievance Committee the district court qualified the finding of support to that directly given. The district court thus carefully refrained from finding that negotiation and administration are financially supported only by Trainmen members. The important part of administration carried on through the National Railroad Adjustment Board which is shared equally by Trainmen and Switchmen members would preclude such a finding, completely apart

craft or class of employees on a single railroad, the practice of bargaining on this basis has steadily diminished in importance. Regional bargaining was begun by the operating crafts in 1902; there were national agreements in the World War I period * * * and national bargaining or something close to it, has been engaged in on a craft or joint craft basis since 1931." See also Jacob J. Kaufman, Collective Bargaining in the Railroad Industry (Columbia University 1954), pp. 47-49, which lists by years the wage movements in which all five operating unions joined in national negotiations.

from the extensive and dominant role the joint national negotiations play in fixing all economic terms, as well as hours, vacations and a host of others, in the Milwaukee agreement. The record here also shows that the Switchmen participated in negotiating various agreements to which the Milwaukee is a party and the Switchmen help man national dispute committees to administer these agreements (A. 61-62, 71-75).

3. The quotation from Seidman in footnote 3 on page 5 of petitioners' brief to the effect that the general committee is "in charge of the collective bargaining and grievance work on that line" is misleading unless read in the context of Seidman's explanation that bargaining on single railroads "has steadily diminished in importance" so that "issues that would have an important impact on the competitive situation of one railroad in relation to one another are handled through national bargaining."[2]

4. In the first sentence on page 11 of petitioners' brief it is stated that "the district court found that SUNA members were 'free riders' ", citing paragraph 7 at A. 105. There is no such finding in that paragraph nor elsewhere. The district court made the more limited finding that SUNA members employed by the Milwaukee do not contribute a full share of financial support to the General Grievance Committee of the Trainmen.

5. The statement in the last full sentence of the text on page 7 of petitioners' brief that "SUNA is in a position to offer a cheaper membership" and the statement in the footnote that "Operating brotherhoods such as SUNA charge 'nominal' dues" are without any support in the record and we find no reference to the Switchmen's Union in the citation to page 257 of the House Hearings to which petitioners make reference. The reference to the

2. Seidman, *op. cit.*, pp. 14-15.

dues of the Trainmen's Union, which would be relevant if any claim of cheaper dues is considered, fixed at $1.50 for grand lodge dues, accompanied usually by an assessment of $1.00 monthly for the local lodge, plus grievance assessments of $1.50 to $3.00 per month, as shown by Seidman at the pages set forth in the Petition for Certiorari in this case, p. 3, n. 2, is omitted from the brief of petitioners on the merits in this Court.

6. If the statement in footnote 13, page 10 of petitioners' brief that "seniority operates solely within such services but not between train or yard service and engine service", is read as negating an ebb and flow between train and yard service, it is inaccurate. The Report of Presidents' Railroad Commission established by Executive Order No. 10891, issued February 28, 1962, p. 324, states, "The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during the same tour of duty) is in effect on a number of railroads. Many thousands of employees hold these rights." The National Mediation Board has often had occasion to note such dual seniority rights when it ruled that whether such an employee should vote in the yard craft or the road craft should be determined on the basis of the craft in which he spent the preponderant amount of time during the year preceding the election. See for example, *Pittsburgh & Lake Erie R. R. Co.*, 1 NMB 115, 124 (1938); *Akron, Canton & Youngstown Railway*, 1 NMB 126, 127-129 (1938).

THE NATURE OF THE CASE.

This suit was instituted by the filing in the district court of a complaint alleging that the Milwaukee Railroad and the Trainmen's Union had violated the Railway Labor Act (45 U. S. C. 151, *et seq.*) by entering into and threatening to discharge the named plaintiff employees and all other employees who were members of the plaintiff Switchmen's Union who were employed on the Milwaukee Railroad pursuant to a union shop agreement contrary to the express terms of that statute (A. 4-12). Declaratory relief, injunction and damages, were sought (A. 11-12). Jurisdiction in the district court was invoked under 28 U. S. C. 1337, conferring original jurisdiction on district courts of any civil action or proceeding arising under an Act of Congress regulating commerce, the Railway Labor Act being such an act (A. 4-5). Jurisdiction to grant declaratory relief was invoked under the Federal Declaratory Judgment Act, 28 U. S. C. 2201 (A. 5).

The Parties.

Plaintiffs consist of the Switchmen's Union of North America (herein called the Switchmen's Union) and six yard service employees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (herein called the railroad), who sue in their individual capacity and also as representatives of all members of the Switchmen's Union who are employed by the railroad (A. 5-6).

The defendants are the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen, as well as appropriate officers of that labor organization who are sued both individually and as repre-

sentatives of a class composed of all members of the Brotherhood of Railroad Trainmen (A. 6-7).

The Switchmen's Union is a labor organization, national in scope[1], organized in accordance with the provisions of Section 2 of the Railway Labor Act (45 U. S. C. 152), and participates in the selection and designation of the labor members of the First Division of the National Railroad Adjustment Board (A. 6, 30, 42, 47, 48, 103). The plaintiff Switchmen's Union was organized in 1894 (A. 47). The Switchmen's first local on the Milwaukee Railroad was established in 1899, as Local 10 of the Switchmen's Union of North America, and has continued in existence at all times since that date (A. 48). As of November 14, 1966, the plaintiff Switchmen's Union was regularly receiving monthly dues from 471 yard service employees of the defendant railroad (A. 62-63) and had authorization cards from an additional 250 such employees (A. 49-50, 52, 76).

Local 10 had collective bargaining contracts with the Milwaukee covering various local yards of the railroad between 1899 and 1926, at which time the Railway Labor Act was enacted and was interpreted as abolishing all local yard units and requiring all bargaining units to be systemwide (A. 57).

The Switchmen's Union is the oldest railroad operating union affiliated with the AFL-CIO, having joined the American Federation of Labor in 1906, and having maintained a continuous membership with the AFL and its successor, AFL-CIO at all times since 1906 (A. 43).

The Switchmen's Union is organized on a craft or class basis and confines its membership and representation solely to the craft or class of yard service employees (A.

1. The national-in-scope status of the plaintiff Switchmen's Union was admitted by the Milwaukee Railroad in its answer (A. 6, 30) and stipulated by the Trainmen's Union (A. 42).

47). The craft or class of yard service employees as defined by the National Mediation Board includes yard foremen, helpers and switchtenders or switchmen (A. 75-76, 79). The Switchmen's Union holds exclusive representation rights and the collective bargaining contract for the craft or class of yard service employees on approximately 30 railroads in the United States each of which contracts contains union shop provisions which set forth the exact language of Section 2, Eleventh (c) of the Railway Labor Act as an exception to the requirement of membership in the Switchmen's Union (A. 47-49).

At all times since the 1934 amendments to the Railway Labor Act (48 Stat. 926), which resulted in setting up of the First Division of the National Railroad Adjustment Board with five members, one from each of the five operating crafts, the Switchmen's Union has been the nationally recognized spokesman for the craft or class of yard service employees on all railroads throughout the United States and as such at all times since 1934 has designated and paid the salary and expenses of the representative of this craft or class which sits on the National Railroad Adjustment Board on all cases affecting any operating employee (A. 6, 30, 47-48, 67-69). Since the labor members vote as a unit on cases before the National Railroad Adjustment Board (A. 48, 69) the Switchmen's Union shares in representing all operating employees on all railroads.

The Switchmen's Union has also been recognized as the national representative of the craft or class of yard service employees on numerous occasions when the President of the United States appointed the Presidential Rules Commission (A. 46, 71, 184), national arbitration boards (A. 46, 71) or national emergency boards dealing with issues applicable to all the railroads in the United States (A. 46, 71).

The Switchmen's Union, as the national representative of the craft or class of yard service employees, participated in the negotiation on a national basis with representatives of all Class I railroads in the United States (including the Milwaukee Railroad) and signed jointly with the other four standard railroad operating unions the Washington job protection agreement, amendments thereto and the National Vacation Agreement (A. 61-62, 72-75). The Switchmen's Union as the national representative of the craft or class of yard service employees, has appointed its executive vice president as a representative to the National Vacation Disputes Committee, which is a committee established by the five operating brotherhoods to decide disputes involving the application of the National Vacation Agreement to all employees of all Class I railroads, including the Milwaukee Railroad (A. 71-74). Representatives of the Switchmen's Union have met in conference with representatives of the Milwaukee Railroad with respect to the application of the Washington job protection agreement (A. 71). The Switchmen's Union cooperated with the other four operating brotherhoods in the 1959 National Rules dispute which lasted four years (A. 43, 45).

In addition, representatives of the Switchmen's Union serve on other national disputes committees which are made up of representatives of each of the five standard railway operating organizations (A. 45). These national disputes committees meet with representatives of all the Class I carriers (including the Milwaukee Railroad) for the purpose of negotiating and settling disputes as to the interpretations and applications of national agreements (A. 71).

The Switchmen's Union has also shared with the other four standard railroad operating unions the cost of litigation of issues affecting all of them (A. 45, 69).

The Switchmen's Union was a charter member of the Railway Labor Executives Association, commonly called RLEA, which was organized in 1926 (A. 43). The Switchmen's Union has continuously held membership in RLEA at all times since 1926 and is now a member (A. 43). RLEA is an association of the presidents of all the standard railway labor organizations, with the exception of one organization not presently a member (A. 44). RLEA functions to set policy in the railroad labor field (A. 44). RLEA determines to a large extent the national legislative program to be supported by railway labor (A. 44).

RLEA also represents railway labor on all matters coming before the Interstate Commerce Commission such as whether railroads should discontinue passenger lines or merge and what protection shall be provided for employees displaced or otherwise adversely affected by discontinuance of lines or mergers. (A. 44).

RLEA maintains a Washington office and staff (A. 44), and is financed by an assessment for its costs against each member organization based on per capita membership (A. 44). So part of the dues of each employee of the Milwaukee Railroad which are paid to the Switchmen's Union are subject to the per capita assessment to pay the expenses of the RLEA (A. 44).

The other plaintiffs named in the complaint are six yard service employees of the Milwaukee Railroad, who have seniority respectively of 25, 25, 26, 10, 9, and 15 years of employment with the Milwaukee Railroad as yard service employees (A. 5-6, 29). All the individual plaintiffs have for many years been and now are members of the Switchmen's Union and sued not only on behalf of themselves but also on behalf of approximately 500 members of the Switchmen's Union employed as yard service employees by the Milwaukee Railroad, who constitute a class too numerous

to join in person and whom plaintiffs fairly represent (A. 5-6, 29, 46-47). Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their continued membership in the Switchmen's Union, in that approximately 60 of the yard service employees of the defendant railroad are insured in the Equitable Life Assurance Society under Policy ADSD 16222 issued to them as members of the Switchmen's Union and some others are insured under Aetna Group Policy 7-47350, also issued to them as members of the Switchmen's Union, all of which constitute valuable property rights which will be lost if they are required to comply with the terms of the illegal union shop agreement entered into on February 1, 1967 between the Milwaukee Railroad and the Trainmen's Union, which requires them to join and maintain membership in the Trainmen's Union as a condition of employment, as hereinafter set forth (A. 9-10).

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company is a corporation organized and existing under the laws of the State of Wisconsin, which operates a railroad and is a carrier within the meaning of Section 1 of the Railway Labor Act (A. 7, 102-103). The defendant railroad employs 1175 employees in the craft or class of yard service, known variously as yardmen, yard foremen, helpers and switchmen (A. 49, 50, 76).

The Brotherhood of Railroad Trainmen has never been certified as the representative of the yard service employees of the Milwaukee Railroad but that railroad without requiring the Trainmen's Union to prove its majority, has recognized and bargained with the Trainmen's Union as the exclusive collective bargaining representative of all yard service employees of the railroad (A. 102-103).

The defendant Elmer L. Dirks is General Chairman of the General Grievance Committee maintained by the Train-

men's Union for Milwaukee Railroad's Lines East, and was sued both individually and as such general chairman (A. 7, 103). The complaint alleged that the members of the Trainmen's Union being so numerous as to make it impossible to bring them all before the court in person, the defendant Elmer L. Dirks as an officer of the defendant Trainmen's Union and as a member of the class will fairly ensure adequate representation of all members of the defendant Trainmen's Union for purposes of this suit (A. 7).

History of Prior Union Shop on Defendant Railroad.

Prior to the enactment of the Railway Labor Act in 1926 the Switchmen's Union had collective bargaining agreements with the Milwaukee Railroad governing terms and conditions of employment of yard service employees at various yards of the railroad (A. 57). Numerous yard service employees have at all times both before and after the enactment in 1926 of the Railway Labor Act, continued to be members of the Switchmen's Union and had never, prior to the signing of the illegal union shop agreement here involved, been members of the Trainmen's Union (A. 46, 55-56, 62-65, 69-71, 72-73).

Following the enactment of the union shop amendment to the Railway Labor Act in 1951 (64 Stat. 1238) which for the first time legalized a limited form of union shop for railroad employees (Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152, Eleventh), the Milwaukee railroad and the Trainmen's Union entered into a union shop agreement which as written permitted membership in the Switchmen's Union to satisfy the requirement of union membership (A. 82-83, 91). This union shop agreement was applied so as not to require any employee of the railroad to join or maintain membership in the Trainmen's

Union so long as they were members of the Switchmen's Union (A. 52-54).

Each of the plaintiffs W. L. Birkholz, Ray Granger and Thomas Foley has been a member of the Switchmen's Union continuously for the past ten years (A. 5). The other three individual plaintiffs have been members of the Switchmen's Union for shorter periods of time (A. 5-6).

The Switchmen's Union has at all times represented its members who are employed by the Milwaukee Railroad in the processing of their grievances with the railroad and in the handling of their cases before the National Railroad Adjustment Board (A. 57-61, 69-71, 71-73). Local officers of the Switchmen's Union handle these grievances initially with the designated local officer of the Milwaukee railroad and a national vice president of the Switchmen's Union handles these grievances on appeal with the highest designated officers of the railroad (A. 57-59, 69-70, 71-72).

As of November 14, 1966 the Switchmen's Union was receiving regularly monthly dues from 471 yard service employees employed by the Milwaukee Railroad (A. 55-56, 62-63). Some 250 additional yard service employees of the Milwaukee Railroad had signed authorization cards (A. 49-50, 52, 76) designating the Switchmen's Union as the employees' "representative in the handling of all matters relating to rates of pay, rules and working conditions, etc., arising under the Railway Labor Act as amended" (A. 51-52, 81).

Switchmen's Union Petition for NMB Election on Milwaukee Railroad Filed November 14, 1966.

On November 14, 1966, the Switchmen's Union filed a petition (A. 49-50, 75-76) with the National Mediation Board, herein called NMB, accompanied by cards signed by 718 yard service employees of the railroad designating the

Switchmen's Union as their authorized representative for purposes of the Railway Labor Act (A. 49-50, 75-76). The petition alleged that the Switchmen's Union had been designated as their representative for purposes of the Railway Labor Act by a majority of the yard service employees of the Milwaukee Railroad (A. 49-50, 75-76). The NMB was asked to certify the Switchmen's Union as the representative for purposes of the Railway Labor Act of all employees within the craft or class of yard service employees on the Milwaukee Railroad (A. 49-50, 75-76).

The petition was docketed by NMB as Case No. R-3895 (A. 51, 79-80) and, except for the occurrence of the events hereinafter described the NMB would, within the course of the next few months, have held an election to determine whether the yard service employees of the Milwaukee Railroad desire to be represented by the Switchmen's Union or by the Trainmen's Union (A. 8). A copy of the petition filed by the Switchmen's Union with the NMB, together with the correspondence from the NMB pertaining to the processing of this petition was introduced in evidence as exhibits (A. 49-51, 75-80).

Illegal Union Shop Agreement of February 1, 1967.

Two days after the foregoing petition was filed by the plaintiff Switchmen's Union, the defendant Trainmen's Union served notices on the defendant railroad seeking to modify and amend its union shop agreement dated June 9, 1953 (A. 100). In settlement of this notice the defendant Trainmen's Union and the defendant railroad entered into a union shop agreement dated February 1, 1967 (A. 54, 55, 92-100) for the purpose of influencing the results of the election to be conducted by the NMB in favor of the defendant Trainmen's Union and to the disfavor of the plaintiff Switchmen's Union, by requiring all employees in

the craft or class of yard service to join and maintain membership in the defendant Trainmen's Union within 60 days after the effective date of the agreement, without providing that as to all employees covered by said agreement membership in any other labor organization national in scope which admits to membership employees within the craft or class of engine, train, yard or hostling service shall satisfy the requirement of membership as required by said agreement although Section 2, Eleventh (c) of the Railway Labor Act excepts from the ban of Section 2, Third, only agreements which permit such alternate membership (A. 8, 9, 54-55, 92).

The pertinent provisions of said union shop agreement are as follows (A. 54, 55, 92-93):

> "Section 1.
>
> "(a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *
>
> (b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East) covering employees of a class or craft in train or yard service; provided, However, that nothing contained in this agreement shall prevent any employee from changing membership from one organization to another labor organization, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East), covering employees of a craft or class in train or yard service; provided, further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood."

The effect of the above quoted proviso clauses of Section 1 (b) of said union shop agreement is to require all employees in yard service to join and maintain membership in the defendant Trainmen's Union because the plaintiff Switchmen's Union does not have any labor contract with the defendant railroad (A. 8, 104). Some of the yardmen employed by the defendant railroad do not have interchangeable rights to serve in road service and hence for this additional reason would be within the language of the illegal portions of this union shop agreement and would illegally be required to join and maintain membership in the defendant Trainmen's Union, unless the agreement is declared illegal and its enforcement enjoined (A. 8, 103-104).

The effect of Section 1 of said union shop agreement is to require all of the plaintiffs, and all of the other members of the class they represent, to cease being members of the plaintiff Switchmen's Union and to become and remain members of the defendant Trainmen's Union or be discharged from their employment with defendant railroad (A. 8-9, 104).

The complaint alleged that Section 2, Eleventh (c) of the Railway Labor Act (45 U. S. C. 152, Eleventh (c)) grants all yard service employees the unqualified right to belong to any labor organization national in scope which admits yard service employees to membership without any limitation that such labor organization must have a labor contract with the employer and without any limitation that the employees must have interchangeable rights (A. 8-9). By denying plaintiffs the right to belong to any labor organization national in scope which admits yard service employees to membership, the union shop agreement of February 1, 1967, between defendant Trainmen's Union and defendant railroad violates Section 2, Third, of the Railway Labor Act (45 U. S. C. 152, Third).

Proceedings in the District Court.

The agreement by its terms became effective on March 1, 1967 (A. 100). The complaint herein was filed on February 23, 1967 and plaintiffs on the same day applied to the district court for a restraining order which would have postponed the effective date of the agreement *pendente lite* (A. 1, 109-110). The district court denied the motion for a restraining order (A. 1, 109-110). On March 1, 1967, the plaintiffs filed a motion for preliminary injunction to enjoin the enforcement of the union shop agreement *pendente lite* (A. 1). The district court refused to rule on the motion for preliminary injunction until he could conduct a trial. The trial on the motion for preliminary injunction was set for April 3 and 4, 1967, and the district court ruled that he would consolidate the trial on the merits with the hearing on the motion for preliminary injunction (A. 41-42).

When the union shop agreement became effective on March 1, 1967 all the yard service employees who were members of the plaintiff Switchmen's Union joined the defendant Trainmen's Union in order to avoid losing their jobs. Some 400 of these employees who prior to March 1, 1967, had been regular dues paying members of the plaintiff Switchmen's Union could not afford to pay the initiation fees and dues required by the defendant Trainmen's Union and at the same time pay dues to the plaintiff Switchmen's Union (A. 10, 55-56, 64-65). By the time the trial of this case in the district court took place on April 3 and 4, 1967, approximately 400 employees who prior to March 1, 1967 had regularly been paying dues to the plaintiff Switchmen's Union ceased to be members of the plaintiff Switchmen's Union and ceased to pay dues to the plaintiff Switchmen's Union solely because they were required by said union shop agreement to pay an initiation

fee and dues to the defendant Trainmen's Union in order to hold their jobs with the defendant railroad (A. 55-56, 64-65).

Each of the plaintiffs and each of the other members of the class they represent, has valuable seniority rights which entitles him to preferential employment by the defendant railroad, which constitute valuable property rights which will be lost in the event of a discharge for failure to join and remain a member of the defendant Trainmen's Union as required by said agreement of February 1, 1967 (A. 10).

The complaint contains the requisite allegations as to irreparable damage, inadequacy of other remedies and necessity for equitable relief (A. 11).

Findings of Fact, Conclusions of Law and Judgment of the District Court.

On May 24, 1967, the district court made the following findings of fact and conclusions of law (A. 102-108).

The defendant railroad is a carrier within the meaning of Section 1 of the Railway Labor Act, 45 U. S. C. 151 (A. 102-103). The defendant Trainmen's Union is the representative of the yard service employees of the defendant railroad (A. 102-103). The defendant Trainmen's Union, through its General Grievance Committee, is a party to collective bargaining agreements with the defendant railroad setting forth rates of pay, rules and working conditions for all yard service employees of the defendant railroad employed on Lines East (A. 103). The activities of the General Grievance Committee receive direct financial support only from the membership of the defendant Trainmen's Union (A. 102-103).

Both the plaintiff Switchmen's Union and the defendant Trainmen's Union are among the five "standard" operating organizations qualified to select or designate members

of the National Railroad Adjustment Board, First Division, as provided in Section 3 of the Railway Labor Act, 45 U. S. C. 153 (A. 103). On November 14, 1966, under the terms of the union shop agreement then in effect between the defendant Trainmen's Union and the defendant railroad, a number of the yardmen in the bargaining unit represented by the Defendant Trainmen's Union, including the five[2] individual plaintiffs, held membership in the plaintiff Switchmen's Union (A. 103).

On February 1, 1967, the defendant Trainmen's Union and the defendant railroad modified their union shop agreement to require membership in the defendant Trainmen's Union of all yardmen except those holding employment rights in another craft or class and to limit alternate membership for such persons to organizations having a labor agreement with the defendant railroad covering employees in its train or yard service (A. 103-104). The plaintiff Switchmen's Union has no labor agreement with the defendant railroad (A. 103-104). Membership in the plaintiff Switchmen's Union will not satisfy the obligations imposed upon yardmen by the February 1, 1967, union shop agreement (A. 103-104).

The plaintiff Switchmen's Union and the defendant Trainmen's Union help finance activities of the Railway Labor Executives Association, a private organization of the presidents of the "standard" railroad labor unions to formulate and sponsor national leglislative and policy programs of common concern (A. 104-105). Both the plaintiff Switchmen's Union and the defendant Brotherhood have represented their respective memberships on various boards and committees and have participated in litigation and the negotiation of agreements affecting employees on all Class I railroads (A. 104-105).

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2. The reference to five seems to have been a typographical error as nothing in the record indicates any difference between the six individual plaintiffs in this regard.

The district court found that although in several instances the plaintiff Switchmen's Union had chosen to process cases before designated officers of the defendant railroad and before the National Railroad Adjustment Board for individual members of the plaintiff Switchmen's Union employed by the defendant railroad who otherwise the defendant Trainmen's Union would have to represent, the members of the plaintiff Switchmen's Union employed by the defendant railroad do not contribute a full share of the financial support to the General Grievance Committee of the defendant Trainmen's Union for the performance of its functions under the Railway Labor Act (A. 105).

On November 14, 1966, the plaintiff Switchmen's Union applied to the NMB for a representation election among yardmen employed on the eastern and western lines of the defendant railroad, but no such election has been ordered or scheduled by the NMB (A. 105). The plaintiff Switchmen's Union is competing with the defendant Trainmen's Union for the allegiance of the yardmen and seeks to supplant the defendant Trainmen's Union as their statutory bargaining representative (A. 105).

The district court found that evidence does not demonstrate that the defendant railroad and the defendant Trainmen's Union modified their union shop agreement for the purpose of influencing the outcome of any election that the NMB may conduct because the new union shop agreement dated February 1, 1967 applies only to Lines East and the Lines West agreement does not prohibit membership in the plaintiff Switchmen's Union (A. 105).

Conclusions of Law of the District Court.

The district court held that it had jurisdiction of the case on three grounds: (1) under the Railway Labor Act, 45 U. S. C. 151, *et seq.*, and under 28 U. S. C. 1337, the district court has jurisdiction to determine the validity of union shop agreements; (2) the district court has jurisdiction to determine whether the union shop agreement of February 1, 1967, was entered into by the defendants for the purpose of influencing the outcome of a representation election to be conducted by the NMB; (3) since the complaint involves a dispute between certain employees of the defendant railroad and their bargaining representative it is within the jurisdiction of the district court notwithstanding joinder of the railroad employer (A. 106).

The district court held that the language of Section 2, Eleventh (c) cannot be literally applied because to do so would give it a broader application than the accepted purpose of the statute to eliminate the "free rider" who did not support his representative's functions under the Act (A. 106-107). Since the defendant Trainmen's Union is the statutory representative of the yardmen here involved, it was the Trainmen's Union, and not the Switchmen's Union, which was the "object of Congressional concern" (A. 107).

The district court quoted the *obiter dictum* of the Supreme Court in *Pennsylvania* v. *Rychlik*, 352 U. S. 480, 492 (1957), that "The only purpose of Section 2, Eleventh (c) was a very narrow one—to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts" (A. 107). From this *obiter dictum* the district court concluded that the February 1, 1967, union shop agreement "adequately meets the narrow problem of intercraft mobility by permitting alternative membership for yardmen holding em-

ployment rights in another craft or class, namely those with interchangeable rights, and in unions that have contracts with the Carrier covering the other craft or class involved" (A. 107).

The district court buttressed its conclusion that the plaintiff Switchmen's Union was not intended to be protected by Section 2, Eleventh of the Railway Labor Act by quoting out of context the further *obiter dictum* from the *Rychlik* case (352 U. S. 480, 488-489, 494) which the district court paraphrased as stating that it was not the purpose of Congress in Section 2, Eleventh (c), "to help dissident or rising new unions recruit new members" or to permit "employees to choose between membership in (their bargaining representative) and another competing union" (A. 107). The district court concluded that the plaintiff Switchmen's Union, "a rival organization without a labor agreement covering a craft or class to which yardmen employed by the carrier may be transferred, is not within the intendment of the statute" (A. 107).

The fact that the plaintiff Switchmen's Union, on the same basis as the defendant Trainmen's Union, "is qualified to select or designate members of the National Railroad Adjustment Board or participates in other activities of concern to railroad labor generally" was not regarded by the district court as sufficient to "bring" the plaintiff Switchmen's Union or its members "within the alternative union protections of Section 2, Eleventh (c) in the absence of a showing that they face the problem of intercraft mobility" (A. 107).

The district court ruled that since it had determined that the February 1, 1967 agreement is lawful, its execution and enforcement do not constitute unlawful coercion, interference or influence under Section 2 of the Railway Labor Act, U. S. C. 152 (A. 108). The district court accord-

ingly held that the defendants have not violated any of the provisions of the Railway Labor Act (A. 108) and therefore the plaintiffs failed to show any irreparable injury or any damages (A. 108).

Judgment of the District Court.

On May 24, 1967, the district court entered judgment dismissing the complaint on the merits and awarding the defendants their costs (A. 110).

Opinion of the Seventh Circuit Court of Appeals.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed (A. 111-121). It held that "the literal reading of Sec. 2, Eleventh (c) expresses the intention of Congress as demonstrated by the legislative history of the Act" (A. 115). Concededly the union shop agreement here involved violates Section 2, Eleventh (c) read literally (A. 114). This union shop agreement "requires two conditions, in addition to the national in scope requirement of the Act, before alternate union membership is permissible" (A. 115). These two conditions are that the union have a contract with the railroad and that the employee have interchangeable employment rights in the craft represented by the alternate union (A. 115). Since the Switchmen's Union does not have any contract with the Milwaukee and since most yard service employees do not have interchangeable rights, this contract does not permit alternate membership in the Switchmen's Union (A. 115).

The Seventh Circuit reviewed the legislative history of Section 2, Eleventh (c) and pointed out that Congress had rejected a proposal of the Trainmen's Union which would have limited alternate union membership to unions hold-

ing contracts and to employees holding interchangeable rights (A. 115-118). The Court concluded (A. 118):

> "We think it would be absurd to interpret away the literal language of 2 Eleventh (c) by reading it as though it said almost exactly what was said in a proposal which was rejected at committee hearings and which places members of SUNA—organized under the Act and national in scope and covering the craft of yard services—in the dilemma of choosing between compulsory dual unionism or a compulsory change from their own craft union to the Trainmen. Each horn of this dilemma was rejected by Congress in 1950."

In addition the Seventh Circuit listed three other considerations which supported a literal interpretation of Section 2, Eleventh (c), namely, the Trainmen's construction would "render the second proviso of 2 Eleventh (c) devoid of any meaning" (A. 118-119); the uncertainties attending the scope of permissible alternate membership would place a burden on each employee of establishing his intercraft rights and impose on federal courts in connection therewith the necessity of making "ad hoc adjudications in a large number of individual cases" (A. 119); and the "contemporaneous interpretation of this Section by the operating craft brotherhoods" for fifteen years in a literal fashion (A. 119-120).

SUMMARY OF ARGUMENT.

The Argument section of the brief of respondents in the companion case of *Brotherhood of Railroad Trainmen* v. *O'Connell*, No. 158, this term is adopted by reference and is not repeated here. Only additional argument to answer further points made by the petitioners in this case are presented in this brief.

Subparagraph (c) of Section 2, Eleventh of the Railway Labor Act was drafted by the operating unions themselves and adopted by Congress in the language drafted by the operating unions. On the floor of Congress it was substituted for an amendment unanimously reported by both the Senate and House Committees which would have guaranteed all employees, operating and non-operating alike, the right to satisfy the membership requirements of any union shop agreement by membership in any labor organization without any requirement of joining or maintaining membership in the contracting union. All remarks on the floor of Congress that the language of subparagraph (c) was intended to accomplish the same purpose as the committee amendment must be read as having reference to the amendment giving unlimited alternate membership choice. So read the conclusion follows that Subparagraph (c) was intended to operate in accordance with its plain and unambiguous literal language.

A literal reading was followed for fifteen years by the unions which drafted Subparagraph (c). Also all carriers, courts, administrative agencies and writers without exception read and applied Subparagraph (c) literally. It must be assumed the draftsmen knew what they meant when they set down on paper the clear and unambiguous provision of Subparagraph (c).

The prevalent and long continued practice of all operating unions in joining to bargain collectively on a national basis with respect to all economic issues, and with respect to many non-economic issues, as well as to administer all agreements, means that membership in any one of the operating unions serves to support financially the collective bargaining activities which realistically determine wages, hours and conditions of employment of all operating employees. No employee who is a member of any operating union is a free rider, irrespective of whether or not his union holds a contract on the particular carrier on which he is employed.

Congress regarded only those employees who belonged to no union as free riders. As members of Congress stated on the floor of Congress during the debate preceding the enactment of Subparagraph (c), the bill was directed at those employees on the railroads who did not belong to any union. Only those employees were required by Subparagraph (c) to join the contracting union. And even they, as well as all other members, may change membership to any other union national in scope once they have joined the contracting union.

A literal reading of Subparagraph (c) affords a type of union shop peculiarly appropriate to the situation of railroad operating employees. Because operating employees usually hold seniority rights in more than one craft, union security agreements with bona fide unions of railroad employees were practically non-existent even prior to the illegalization of union security by the 1934 amendments to the Railway Labor Act. Only 23 agreements were then in existence and these were percentage contracts, which required only a percentage of the employees covered by the contract to belong to the contracting union. The percentage was usually 75 percent. The historical precedent of this type of contract suggests that the draftsmen of Sub-

paragraph (c) were familiar with the partial union security contract and explains that its literal language was deliberate and well considered.

As early as 1941, Reverend Toner, in his authoritative work on closed shop contracts, after commenting on the problems of dual craft seniority which made traditional union security unworkable, advanced the multiple choice union security agreement as a logical solution to the problem.

The 544 instances during the 15 years preceding the enactment of the union shop amendments in which, as shown by the Annual Reports of the National Mediation Board, the traditional craft union, primarily as the result of shifts of employees from one craft to another due to economic forces and not to the change of union affiliation, lost its representation rights to another operating union, had established a practice of tolerance for enclaves of minority union membership. Subparagraph (c) was drafted in a manner which avoided upsetting this practice.

The freedom of choice of operating unions serves the beneficial function of increasing the consideration which the union affords its members.

A literal reading is not only compelled by the legislative history and contemporaneous application, but also by the beneficial results which thereby are achieved.

ARGUMENT.

In the companion case, *Brotherhood of Railroad Trainmen* v. *O'Connell,* No. 158, this Term, the Brief for Respondents, pp. 20-37, set forth in chronological sequence the legislative history of Subparagraph (c) of Section 2, Eleventh of the Railway Labor Act. Because these cases have been set down for argument together, we do not here repeat, that legislative history or any of the other arguments with respect to the interpretation of Section 2, Eleventh (c) there set forth but incorporate the Argument portion of that brief herein by reference. Copies of the Brief for Respondents in *BRT* v. *O'Connell,* No. 158, this term, have been served on all parties to this case.

I.

SUBPARAGRAPH (c) OF SECTION 2, ELEVENTH OF THE RAILWAY LABOR ACT WAS DRAFTED SOLELY BY THE OPERATING UNIONS, WAS ACCEPTED BY CONGRESS WITHOUT CHANGE AND WAS UNIFORMLY GIVEN A LITERAL INTERPRETATION BY ALL OPERATING UNIONS, CARRIERS, COURTS, ADMINISTRATIVE AGENCIES AND WRITERS FOR FIFTEEN YEARS AFTER ITS ENACTMENT.

When the amendment setting forth the present language of Subparagraph (c) was presented to Congress it was described as the language which had been drafted by the operating unions themselves and upon which they all agreed except the Brotherhood of Locomotive Engineers (96 Cong. Rec. 16261, 16330).

Congress found no need to make any changes in this language. If all the unions involved were agreed upon

a solution which, literally read, met the objections which the railroads had raised, there was certainly no need for Congress to do other than adopt it without making any careful legislative documentation of congressional intent. The railroads had called the attention of Congress to the prevalence of minority enclaves in the operating crafts. Daniel P. Loomis, testifying on behalf of the Association of American Railways, had voiced as one objection to the union shop amendment as proposed in the original bill, the problems which would face railroads if they tried to abolish historically existing practices of the majority union tolerating membership in a minority union. He testified (House Hearings, p. 159; Senate Hearings, p. 315):

> "In other instances, possibly 60 percent of the employees in a particular craft belong to one organization and the other 40 percent to another organization. Under this amendment they would all be forced to join the organization holding the contract without any regard to the preservation of such brotherhood benefits and insurance benefits as they may have by reason of their present membership in another organization. This is particularly true among the operating crafts, where employees may work as firemen today and engineers tomorrow, or as trainmen today and conductors tomorrow. Thousands of employees move back and forth in these classes with the rise and fall of business and any attempt to dictate a union shop would result in utter chaos."

Mr. Loomis pointed to the related fact that the balance between majority and minority union changes frequently, which again would give rise to chaotic situations if the traditional form of union shop were adopted. He testified (House Hearings, pp. 161, 172; compare Senate Hearings, p. 318):

> "Frequently in the railroad industry there are changes in the duly authorized representative and the organization would probably insist upon an agreement which

would upon such change in representation result in all of the employees of the craft or class involved being required to join another organization.

* * * * *

"You have a situation on representation that, on some properties and other crafts is very close. For example, one of the railroads * * * according to the records of the last election held, they would indicate that about 55 percent of the yard men on that railroad belonged to the switchmen's union and the other 45 percent belonged to the Brotherhood of Railroad Trainmen. That contract happens to have changed hands I think twice in recent years.

"With a union shop, I take it that the 45 percent that belonged to the Brotherhood of Railroad Trainmen, and who hope to reestablish the majority that they held 3 or 4 years ago, would be required to join the switchmen's union * * *."

The table annexed at the end of our brief an as appendix confirms the testimony of Mr. Loomis as to the frequency of such changes immediately preceding the consideration by Congress of the union shop amendment.

When the operating unions agreed upon the language which is now Subparagraph (c), both the Senate and the House Committees had unanimously agreed upon a proviso which would have guaranteed every railroad employee, both non-operating and operating, the right to satisfy the membership requirements of a union shop agreement by membership in any labor union, without qualification. Hence the proposal to limit only union shops applicable to operating crafts and even as to them to limit the satisfying membership to standard unions, could not have been viewed by Congress as other than a refinement of its proposal that membership in any union satisfy union shop requirements.

That all the operating unions and all the carriers understood that Subparagraph (c) was intended to be read

literally is confirmed not only by their uniform practice of writing all contracts signed from 1951 to 1966 to include the express language of Subparagraph (c) but by their explanation of that Subparagraph to Congress in their briefs in *Pennsylvania Railroad* v. *Rychlik,* 352 U. S. 480 (1957). There is not a single word in any of the briefs for the carrier or the operating unions, all of whom filed briefs either through the RLEA or individually, that Subparagraph (c) was limited to temporary shuttling back and forth, or that membership had to be in a contracting union.

The Brotherhood of Railroad Trainmen in its brief in *Rychlik,* No. 56, October Term, 1956, pp. 28-29, stated:

> "The 'national in scope' language of Section 2, Eleventh (c) emphasizes the right of a union 'national in scope' to enlist employees on the basis of its privileged status and to insure them that membership therein satisfies the union shop requirement. This language in terms of the right of individuals, means only that they have the right not to be discharged if they belong to a union that has qualified itself as 'national in scope'."

In the brief of the Brotherhood of Locomotive Engineers filed as amicus curiae in the *Rychlik* case, No. 56, October Term 1956, pp. 12, 25, they state:

> "When a union shop agreement authorized by the 1951 amendments of the Railway Labor Act has been entered into between a carrier and the representatives of a craft of operating employees, all employees in the craft are required to become members of the craft union or of another union admitting members of such craft which is national in scope and organized in accordance with the Railway Labor Act. * * *
>
> * * * * *
>
> "* * * the phrases 'national in scope' and 'organized in accordance with the Act' include the requirement that such union shall be required to assume its

duty of establishing its eligibility to participate in the selection of members of the National Railroad Adjustment Board. Before it has so established its eligibility, it has not established its due responsibility under the Act. To conclude otherwise would create an immunization of the 'free rider' status of the members of such a nonparticipating labor organization, and thus defeat the underlying principle of the Union Shop Amendment."

The Brief of the Railway Labor Executives' Association as amicus curiae, in *Rychlik,* No. 56, October Term, 1956, pp. 4, 9, states:

> "No individual rights are contravened by a construction of the statute as permitting the execution of union security agreements which limit the employee's choice of union membership to either the certified bargaining agent, or an organization which has established its 'national in scope' status * * *
>
> "* * * the individual's right * * * is simply to be exempt from the requirement of membership in the organization holding the union shop agreement if he is a member of another organization which already has established its qualifications under Section 2, Eleventh (c)."

The Brief for the Pennsylvania Railroad Company, in *Rychlik,* No. 56, October Term 1956, pp. 26-27, 41, states:

> "When a railroad employee is cited for non-compliance with a union shop agreement his defense to such a charge must necessarily fall into one of the following categories: (1) proof that the required payments were tendered; (2) proof that his membership in the union has been denied or terminated for some reason other than failure to tender the required payments to the union; or (3) if he is an employee in engine, train, yard, or hostling service, proof that he is a member of some other labor organization, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service. If

> the employee can prove that his case falls within any of the foregoing categories he has shown that he is in compliance with the union shop agreements permitted by the Railway Labor Act.
>
> * * * * *
>
> "* * * an individual employee * * * acts at his peril when with knowledge of the provisions of the union shop agreement and of the Railway Labor Act he terminates membership in the union which is his collective bargaining agent and joins another union. If the other union is not already recognized and established as a union national in scope and otherwise qualified under Section 2, Eleventh (c) of the Act, the employee, even if he believes in good faith that the other union is national in scope, has placed himself beyond the protection of the union shop agreement and the Railway Labor Act."

Joel Seidman in his authoritative work on the Brotherhood of Railroad Trainmen (John Wiley & Son, 1962), which petitioners cite in their brief, pp. 5, 9, and which was written with the cooperation of the Trainmen, as appears in the preface to the book, states, pp. 16-17:

> "In 1951 * * * the railroad unions persuaded Congress to amend the Railway Labor Act to legalize the union shop * * * the provision was written with respect to engine, train and yard service, to require union membership, not necessarily in the union units bargaining rights, but in any union that was national in scope and admitted members of the particular craft or class. Employees were thus allowed to change from one organization to another, despite the negotiation of a union shop clause. * * *
>
> "Where the Brotherhood has a union shop clause in effect, therefore, a worker may hold his job by belonging to the unions of the Conductors or the Switchmen, if for any reason he finds the Trainmen's organization not to his liking. This gives the member a certain independence in his relation to the union and forces the officers to be more responsive to the desires of the membership and more considerate of their feelings than they otherwise might be."

In the whole series of cases involving UROC during the 1950's no union and no carrier ever suggested that membership in UROC was deficient because UROC held no contracts. In addition to the *Rychlik* case, see *Pigott* v. *Detroit, Toledo & Ironton R. Co.*, 221 F. 2d 736 (6th Cir. 1955), certiorari denied 350 U. S. 833; *Alabaugh* v. *B&OR Co.*, 125 F. Supp. 401, 407 (D. Md.), affirmed, 222 F. 2d 861 (4th Cir., 1955), certiorari denied 350 U. S. 839; *BLF&E* v. *Northern Pac. Ry. Co.*, 279 F. 2d 641 (8th Cir., 1960); *UROC* v. *Northern Pac. Ry. Co.*, 208 F. 2d 135 (9th Cir., 1953), certiorari denied, 347 U. S. 939; *UROC* v. *Wyer*, 115 F. Supp. 359 (S. D. N. Y. 1953), affirmed, 205 F. 2d 153 (2d Cir., 1954), certiorari denied, 347 U. S. 929; *UROC* v. *Pennsylvania R. Co.*, 212 F. 2d 938 (7th Cir., 1954).

In view of this uniform literal interpretation of Subparagraph (c) by the whole railroad industry, including the Trainmen who participated in drafting the language, we submit the court below and the Second Circuit in the *O'Connell* case were correct when they adopted a literal interpretation.

II.

BOTH THE NEGOTIATION OF THE MAJOR ITEMS IN COLLECTIVE BARGAINING AGREEMENTS APPLICABLE TO OPERATING EMPLOYEES AND THEIR ADMINISTRATION IS HANDLED BY ALL STANDARD OPERATING UNIONS ACTING JOINTLY SO THAT MEMBERSHIP IN ANY ONE OF THEM CONSTITUTES A SHARING OF THE COSTS.

The record in this case shows that although the Switchmen's Union does not hold the contract for yard service employees on the Milwaukee, the Switchmen's Union has bargained collectively with the Milwaukee on a national basis as part of negotiations conducted by the operating unions acting jointly and dealing with representatives of

all Class I railroads (A. 61-62, 71-75). And the Switchmen's Union participates, not only by reason of its membership on the National Railroad Adjustment Board, but also by its representation on national disputes machinery under the Washington Job Protection Agreement and the National Vacation Agreement, to administer collective bargaining agreements applicable to the Milwaukee (A. 61-62, 71-75). In the course of these activities the Switchmen have met and dealt with the Milwaukee on behalf of yard service employees of the Milwaukee (A. 57-61, 69-71, 72-75).

The authoritative work in the Trainmen's Union by Joel Seidman, *op. cit.*, pp. 14-15:

> "Although certification under the Railway Labor Act as amended is for a craft or class of employees on a single railroad, the practice of bargaining on this basis has steadily diminished in importance. * * * national bargaining or something very close to it has been engaged in on a craft or joint basis since 1931.
>
> "National bargaining on wages readily accommodated itself to the legal requirements of collective bargaining * * * the real bargaining gets under way with the heads of the cooperating unions on one side of the bargaining table and representatives of the three regional associations of carriers on the other.
>
> "* * * In general it may be said that issues that would have an important impact on the competitive situation of one railroad in relation to another are now handled through national bargaining * * *".

It is thus evident that membership in the Switchmen's Union contributes to the support of collective bargaining for the yard service employees on the Milwaukee. Judge Herlands in his opinion in the district court in the *O'Connell* case, No. 172, this Term, p. 28a, which was adopted by reference by the court below in this case (A. 118) relied upon this sharing of costs, stating:

> "* * * the provision—literally construed—reconciles the problem of intercraft mobility with the primary

> purpose underlying the 1951 amendments to allow for an equitable sharing of the costs of representation. For by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board, membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements'' (footnotes omitted).

The numerous assertions in petitioners' brief, pp. 13, 17, 35, 42, and in the brief of the Brotherhood of Locomotive Engineers, pp. 8-12, that Subparagraph (c) cannot be given a literal reading since the objective was to spread the cost of collective bargaining rests upon the false assumption that membership in a union which does not hold the contract on a given line does not contribute to the support of that collective bargaining. It does so contribute when, as here, that union shares fully in paying for its share of the expenses of joint national bargaining and contract administration. The Brotherhood of Railroad Trainmen so stated in its brief in *Rychlik*, No. 56, October Term, 1956, p. 30, when it stated:

> ''One result of imposing upon the union the obligation of utilizing the procedures of Section 3, First (f) if it desires 'national in scope' status is to remove the possibility of a non-national union enjoying status under the Act without assuming 'its fair share of the burdens and responsibilities attendant upon the administration of the Act.' * * * Most of the financial cost of enforcing the Act and maintaining its administrative processes is borne by the qualified unions. That cost is reflected in the dues of each qualified union.''

Similarly the Brotherhood of Locomotive Engineers in its brief amicus curiae in *Rychlik*, p. 25, fully recognized that any employee who was a member of a union national in scope was not a free rider for it stated:

> "The conclusion thus seems mandatory that the phrases 'national in scope' and 'organized in accordance with the Act' include the requirement that such a union shall be required to assume its duty of establishing its eligibility to participate in the selection of members of the national Railroad Adjustment Board. Before it has established its eligibility, it has not assumed its due responsibility * * * to conclude otherwise would create an immunization of the 'free rider'."

It follows that a literal construction of Subparagraph (c) is entirely consistent with the objective of eliminating free riders.

Indeed it is evident from the legislative history that the free riders at whom the bill was directed were those employees who had never joined any union. Congressman Linehan stated on the floor of Congress during the debate preceding enactment (96 Cong. Rec. 17060):

> "Testimony before our committee was to the effect that some 80 percent of the 1,200,000 railroad employees today are members of a railroad labor organization. Thus it appears this bill is directed at some 250,000 who are not in one of the unions."

Congressman Wolverton stated (96 Cong. Rec. 17050):

> "* * * at the present time there are approximately 1,200,000 employees of our railroads. Of these between 75 and 80 percent are members of one or another of the railway labor unions. Thus 20 or 25 percent, who are not members of any union, are enabled to share in all benefits derived from union bargaining without bearing any part of the expense incident to obtaining such benefits. It is only fair to provide that benefits and responsibility should be jointly shared by all."

Other Congressmen similarly explained the bill as directed only at employees who do not belong "to one of the brotherhoods" (Congresman O'Hara, 96 Cong. Rec. 17052)

and "who are not now in one of the unions" (Congressman Harris, 96 Cong. Rec. 17050).

The fact that the aim of Subparagraph (c) was solely those employees who were not members of any union is evident from the proviso which singles out this group as the only one which must join the union holding representation rights. The logic of this is clear. Those employees who have never shown enough interest in unions to join any union can properly be required to join the bargaining agent when the first union shop agreement is signed. These are the only free riders. They cease being free riders by joining the contracting union. Requiring them to join the contracting union does no violence to any choice of unions which they previously exercised, for it is this group that never chose any union. If after joining the contracting union, they have a preference for another of the standard operating unions the last proviso to Subparagraph (c) guarantees them the right to change membership to any other standard operating union.

The scheme of Subparagraph (c) thus confirms the legislative history which shows that membership in any one of the standard operating unions was regarded by the supporters of Subparagraph (c) as adequate support for collective bargaining activities.

III.

A LITERAL CONSTRUCTION OF SUBPARAGRAPH (c) OF SECTION 2, ELEVENTH, AFFORDS A TYPE OF UNION SECURITY WELL SUITED TO THE NEEDS OF THE OPERATING EMPLOYEES.

A. Traditional Forms of Union Security Have Historically Been Regarded as Unsuited to Operating Crafts on the Railroads.

The absence of union security agreements on the railroads prior to 1950 was a well known fact. At the beginning of his testimony on the bills which became Section 2, Eleventh (c), George M. Harrison, appearing on behalf of the Railway Labor Executives Association, testified that prior to 1934 the unions had the "same right as any others in outside industry to bargain for union security" but "it was seldom exercised." Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H. R. 7789, p. 9; Hearings before a Subcommittee of the Committee on Labor and Public Welfare, Senate, 81st Cong., 2nd Sess., on S. 3295, p. 12.

In 1934, when the amendments which illegalized union security on the railroads were being considered the only union security agreements with standard railroad unions were described as 23 "percentage" contracts held by the Brotherhood of Railroad Trainmen. Joseph B. Eastman, Federal Coordinator of Transportation testified (Hearings before Committee on Rules, House, 73rd Cong., 2nd Sess., on H. R. 9861, p. 22):

> "It happens that one of these so-called standard organizations, and only one, that is the Brotherhood of Railroad Trainmen * * * has succeeded in getting from the companies so-called percentage contracts

> which provide that in the yards, a certain percent of the men, which is 75 percent, as a rule, and sometimes goes up as high as 100 percent, shall be members of the Brotherhood of Railroad Trainmen. In other words, it was a closed shop or partially closed shop agreement. I believe there are about 23 of these and they are the only instances I know of such a contract as far as standard organizations are concerned."

James A. Farquahason, representative of the Brotherhood of Railroad Trainmen was definite in his testimony that his organization had 23 percentage contracts. Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., pp. 84-87, 93, 94; Hearings before Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., pp. 199-200, 1 Leg. His. NLRA 1935, pp. 1579-80). For a court decision upholding the validity of two of the Brotherhood of Railroad Trainmen's percentage contracts see *Underwood* v. *Texas & P. Ry. Co.,* 178 S. W. 38 (Tex. Civ. App., 1915). The court's opinion describes the contracts as respectively requiring at least 85 percent and 75 percent of the yard employees to be members of the Brotherhood of Railroad Trainmen.

We mention the percentage contracts because they constitute a precedent in the operating crafts for a form of union security which permitted a substantial minority within the unit to belong to some other union. Both Federal Coordinator Eastman and the court in the *Underwood* case named the Switchmen's Union of North America as the minority union involved.

Reverend Jerome L. Toner, The Closed Shop in the American Labor Movement (Catholic University Press, 1941), a doctoral dissertation, describes the traditional form of union security agreement in its application to operating employees as "impossible and unexpedient" (p. 93).

B. Prior to Consideration of Union Shop Amendments to the Railway Labor Act by Congress, a Multiple Choice Union Shop Had Been Suggested as a Possible Form of Union Security Suitable for Operating Employees on the Railroads.

Reverend Toner in his above cited doctoral dissertation, which was published in 1941,. suggested a solution for the difficulties of applying union shop agreements to the operating employees on railroads. He stated (*op. cit.*, p. 104):

> "A logical solution for making the closed shop contract possible might be found * * * in insisting that all men working as engineers or firemen, conductors or trainmen, be members in good standing of one brotherhood or the other."

C. The Numerous Losses of Representation Rights by the Traditional Craft Union for Its Own Craft During the 1934 to 1950 Period Explains Why the Operating Unions Refused to Support a Bill Which Did Not Guarantee Multiple Choice of Membership in Any One of the Standard Operating Unions.

We have collated from the annual reports of the National Mediation Board a table printed as an Appendix at the end of this brief which shows all the instances, from the time the National Mediation Board began to determine bargaining units until the date of the enactment of the union shop amendment, in which the traditional craft union lost its representation rights with respect to the craft which it traditionally represented. This table shows a total of 544 instances during this period, involving 64 railroads, in which one of the operating unions held both the representation rights for the craft which it traditionally represents as well as the representation rights for a craft

which had traditionally been represented by another operating union. The correlation between the years of low employment and representation of both units by the union representing the higher craft or senior employees as contrasted with the years of high employment and representation by the union representing both units by the union representing the craft of junior employees, establishes that the shift in representation was undoubtedly due in most instances to shifts of employees from one unit to another by operation of seniority rather than to changes in the union affiliation of employees.

It was for this reason that the operating unions did not want a bill which put any restrictions on the right of each operating employee to continue to belong to the union of his own choice without any requirement he join any other union. There is no basis for concluding that even with respect to the Trainmen that Mr. See's draft of a proposed amendment represented anything but a first ill considered attempt at a solution which was hastily abandoned as soon as its unsuitability in the light of historical practices on the railroads, was made plain.

The argument advanced (Brief of Locomotive Engineers as Amicus Curiae, p. 19, n. 15) that "the same situation exists in the non-operating crafts and in bargaining units under the jurisdiction of the National Labor Relations Board," where the winner takes all. But we know of no instances outside of the operating crafts on the railroad where sufficient employees hold seniority in two different crafts, to make the identity of the majority representative depend on whether times were good or bad economically. If such situations exist it may be necessary to devise a special multiple choice union shop for the industry involved.

D. The Multiple Choice Union Shop Afforded by a Literal Construction of Subparagraph (c) Is Entirely Beneficial in Result.

In view of the essentially national character of most bargaining, with all operating unions joining both in negotiation and administration, the multiple choice union shop spreads the economic burden fairly over all employees who share the benefits.

The strong public policy in favor of according freedom of choice to each employee can thus be given effect without creating a group of "free riders."

The availability of alternative union membership tends to spur the union to continuously serve each of its members to their full satisfaction. As Seidman stated in his book on the Brotherhood of Railroad Trainmen (*op. cit.*, p. 17):

> "Where the Brotherhood has a union shop clause in effect, therefore, a worker may hold his job by belonging to the unions of the Conductors or the Switchmen, if for any reason he finds the Trainmen's organization not to his liking. This gives the member a certain independence in his relation to the union, and forces the officers to be more responsive to the desires of the membership and more considerate of their feelings than they otherwise might be."

These are certainly desirable results. There is nothing absurd or unreasonable about the form of union shop afforded by a literal reading of Subparagraph (c).

CONCLUSION.

There is not the slightest basis for refusing a literal reading of Subparagraph (c). The innovation a literal reading provides accords fully with historical practices on the railroads. For fifteen years after its enactment the operating unions which drafted Subparagraph (c) assumed it was intended to apply literally. They did so apply it. No ill effects have been recorded. Instead its effects have been praised. Accordingly the judgment below should be affirmed.

Respectfully submitted,

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December 27, 1968.

SUPREME COURT, U. S.
JAN 13 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 172

ELMER L. DIRKS, Individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO., a Corporation,

Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY, DAVID TUCIBAT, WAYNE BLACKBURN and MARVIN HOISINGTON, Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by The Chicago, Milwaukee, St. Paul & Pacific Ry. Co., and SWITCHMEN'S UNION OF NORTH AMERICA, an Unincorporated Association,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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IN THE

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Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

STATEMENT

Effective January 1, 1969, a new labor organization known as the United Transportation Union ("UTU") was created through unification of four of the five "standard" operating unions: namely, the Brotherhood of Railroad Trainmen, Switchmen's Union of North America, Brotherhood of Locomotive Firemen & Enginemen and Order of Railway Conductors & Brakemen. The Brotherhood of Locomotive Engineers was not a party to the merger and remains a separate labor organization "national in scope". The unification agreement, entered into in August, 1968, was subject to ratification and ap-

proval through a referendum vote of the membership of each of the four organizations. The final tally on membership approval was announced on December 10, 1968. Certain litigation in Florida, seeking to restrain the unification, has been dismissed by the United States District Court, and we know of no other litigation challenging unification of the four operating brotherhoods into the UTU.

Unification of the Trainmen and SUNA ends the competition for membership between them and, since the UTU succeeds to the interests of each organization in this action, moots the controversy as to them. However, in our opinion the controversy in this case between the individual plaintiffs and the class they represent and the Trainmen has not been mooted as a result of unification and, under established precedent, presents a viable controversy for this Court now to determine.

The individual plaintiffs, suing individually and on behalf of all members of SUNA employed by the Milwaukee Road, allege that many of them held valuable insurance rights dependent upon continued membership in SUNA, which would be lost if they were required to comply with the challenged union shop agreement (A. 9). They also allege that petitioners unlawfully interfered with their membership in SUNA which represented a contract and property right valuable to them (A. 11). The prayer for relief sought temporary, preliminary and permanent injunctive relief restraining petitioners from effectuating the challenged union shop agreement by discharging or threatening to discharge members of SUNA for failing to maintain membership in the Trainmen (A. 11-12). The prayer for relief sought damages payable to SUNA of $100,000 and included a

request for such other and further relief as the case may require (A. 12).

Respondents were unsuccessful in all of their efforts to restrain effectuation of the challenged union shop agreement. Their motion for temporary restraining order was denied on February 23, 1967 (A. 1). Their application for preliminary and permanent injunctive relief was denied on April 4, 1967 (A. 2). Therefore, the challenged union shop agreement, made on February 1, 1967, became effective on March 1, 1967 and compelled employees to acquire and retain membership in the Trainmen within sixty calendar days thereafter (A. 92, 100). The decision of the court below, reversing the judgment of the District Court was entered on February 12, 1968 (A. 122).

During the period following March 1, 1967 virtually all members of the class represented by the individual plaintiffs applied for membership in the Trainmen under protest. One protest advised the Trainmen that the employee:

> ". . . will look solely to the . . . Trainmen . . . for reimbursement of all fees, dues, assessments, taxes and other moneys paid into said brotherhood plus interest thereon from this date forward. And mark it well that at this time when my presently held position regarding the [illegality of] said agreement have been vindicated by the decision of said court, the undersigned fully intends to pursue a legal course of action either alone or in concert with others who have been harmed in like manner to regain and recover said moneys."

The full text of a typical protest received by the Trainmen, containing this language, is incorporated herein as Exhibit "A". Many others wrote notes on their dues

checks and separately that they were paying dues to the Trainmen "under protest", thus preserving their claim for reimbursment.

Respondents' brief to the court below expressly alluded to damages allegedly incurred by the individual plaintiffs as a result of the unrestrained operation of the challenged union shop agreement and specified with particularity the damages now claimed on their behalf:

> "The plaintiffs accordingly ask this court to reverse the judgment below and remand with directions to issue a judgment, . . . awarding such damages as the plaintiffs may be able to prove including any wages lost by discharges for failure to join and maintain membership in the defendant Trainmen's Union, dues losses suffered by members of the plaintiff Switchmen's Union for dues paid to the defendant Trainmen's Union by persons electing to continue membership in both the Switchmen's Union and the Trainmen's Union to avoid discharge, dues losses suffered by members of the plaintiff Switchmen's Union and other employees by payment of initiation fees and dues to defendant Trainmen's Union by persons who were coerced to join or maintain membership by reason of the illegal shop contract, [and] insurance losses suffered by employees who, as a result of the illegal union shop agreement, dropped their membership in the Switchmen's Union and thus lost insurance benefits because they could not afford to pay dues to two unions . . ."
> (Brief for Plaintiffs-Appellants, p. 3)

Such claims are, of course, encompassed by the prayer for general relief in the complaint and, in any case, may be awarded under Rule 54(c) of the Federal Rules of Civil Procedure. Neither the demands set forth in the letters or protest nor the relief sought by respondents upon remand have been withdrawn.

ARGUMENT

These claims for monetary awards, particularizing the other and further relief to which the individual plaintiffs now deem themselves entitled, present a "continuing controversy" for this Court now to determine. *Textile Workers Union v. Lincoln Mills,* 353 US 448, 459 (1957).

Moreover, the question presented in this case has retained its importance in that the Brotherhood of Locomotive Engineers remains a separate organization and, under the decision below, operating employees represented by either of the remaining "standard" organizations must be permitted to join the rival even though it does not contract with the carrier. Finally, since the law provides a procedure for other organizations becoming electors of labor members on the First Division and thus eligible for alternate membership privileges under § 2, Eleventh (c), unification does not preclude the involvemnt of other organizations in the question.

CONCLUSION

Based upon the foregoing the petitioners respectfully assert that the issues and controversies should be determind by the Court at this time and request the Court to reverse the judgment below.

Respectfully submitted,

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EXHIBIT "A"

April, 1967

Secretary-Treasurer
Brotherhood of Railroad Trainmen
Lodge #804

Dear Sir:

I, the undersigned, a switchmen in service on the Chicago, Milwaukee, St. Paul and Pacific Rialroad, per the agreement made between your Brotherhood and the Railroad on February 1, 1967, and per the enclosed application blank for membership in your Brotherhood, do hereby make formal application for such membership.

Let it be known by this letter, a copy which is retained in my files, that the undersigned make such application for membership in your brotherhood, soley and strictly under the most vehement of protest. The undersigned sincerely believes that he has been denied his constitunially guarteed exercise of freedom and free choice in association with whom he desires and, upon advice from legal counsel, verily believes that the afore-mentioned agreement flies in the face of the plain language of Section 2, Eleventh (c) of the Railway Labor Act and is thus, illigal, unlawful, not binding and unenforceable. However, to ensure against his loss of seniority on the basis of not having acquired membership in your organization and, solely for that reason, the undersigned will comply with the alleged, but seemingly unlawful requirement stated in the agreement.

Let it be further perfectly and clearly understood, that since this application and the application fee are being tendered under-protest, all dues, assessments, fees, taxes and the like, required to be paid into the Brotherhood of Railroad Trainmen by the undersigned, until such time as it should be adjudged by a final Court of competent jurisdiction that the afore-mentioned agreement is legal and binding upon me, will be paid into the Brotherhood, likewise, under protest.

Further, should a final court of competent jurisdiction adjudge that said agreement is illegal and was so, ab initio and, thus, apposed the presently stated contention and thought of the undersigned, your writer will look solely to the Brotherhood of Railroad Trainmen, its agents and officers and its Local to which the undersigned will be coerced into belonging, for reimbursements of all fees, dues, assessments, taxes and all other monies paid into said Brotherhood, plus interest thereon, from this date forward. And mark it well at this time that when my presently held position regarding the said agreement, will have been vindicated by the decision of said Court, the undersigned fully intends to pursue a legal course of action, either alone are in concert with others who have been harmed in like manner, to regain and recover such monies.

Finally and, to set the record straight, the undersigned is not applying, conditionally, for membership in your brotherhood. He fully intends to be a law-abiding, including capital by-laws and other rules laid down by the brotherhood, dues-paying, card-carrying, member of your brotherhood; he holds no reservations, mental, secret, or otherwise impicit or explicit, in seeking membership or in carrying out the duties and requirement of said membership, he only believes that since coercion, presure and other imorals, if not unlawful, means were used on him to exact compliance with the agreement afore mentioned, to preserve his own self-honesty, self-worth and personal integrity, he would less than forthright were he to apply for said membership and to belong to your brotherhood, in silence.

Sincerely yours,

[*Misspellings in the original*]

May 26, 1969. 395 U.S.

BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* O'CONNELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 158. Argued January 14, 1969.– Decided May 26, 1969.*

No. 158, 391 F. 2d 156; No. 172, 391 F. 2d 289, vacated and remanded.

Arnold B. Elkind argued the cause and filed a brief for petitioners in No. 158. *David Leo Uelmen* argued the cause for petitioners in No. 172. With him on the briefs were *David Previant, John J. Naughton, James P. Reedy,* and *Gerry M. Miller.*

Lee Leibik argued the cause for respondents in both cases. With him on the briefs was *Ruth Weyand.*

Harold A. Ross filed briefs for the Brotherhood of Locomotive Engineers as *amicus curiae* urging reversal in both cases.

Harold C. Heiss filed a brief for the Brotherhood of Locomotive Firemen & Enginemen as *amicus curiae* urging affirmance in both cases.

PER CURIAM.

The judgments are vacated and the cases are remanded to the respective district courts with instructions to dismiss the cases as moot.

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*Together with No. 172, *Dirks et al.* v. *Birkholz et al.*, on certiorari to the United States Court of Appeals for the Seventh Circuit, argued on the same day.